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No. 15609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD ALLEN BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant United States Attorney,
Chief, Criminal Division,*

JOSEPH F. BENDER,
*Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.*

FILED

AUG 15 1957

PAUL P. O'BRIEN, CLERK

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No. 15609

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD ALLEN BLACK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from the denial of a Motion to Correct Illegal Sentence, filed by appellant under the provisions of Section 2255 of Title 28, United States Code.

The District Court had original jurisdiction based upon Section 3231 of Title 18, United States Code.

It appears that the appeal from denial of said Motion was not filed timely in that the Memorandum Opinion denying the Motion is dated January 30, 1957, and was filed January 31, 1957; appellant did not file his notice of appeal therefrom until February 26, 1957. Section 2255 provides in part: “. . . An appeal may be taken

to the Court of Appeals from the order entered on the Motion as from a final judgment on application for writ of habeas corpus . . .” Appeal from a final judgment must be filed within 10 days after entry of judgment, Rule 37(a)(2), and no enlargement is permitted, Rule 45(b). Accordingly, since the instant appeal was not filed on or before February 10, 1957, it appears to have been filed too late to give this court jurisdiction under the provisions of Section 2255 or at all.

Upon the possibility that although this court will find no jurisdiction it may desire a convenient reference to the settled law contrary to the contentions of appellant, or that this court may determine that it does have jurisdiction to entertain the appeal, the Government files this Brief in response to the Opening Brief of appellant.

Appellee requests the indulgence of the court in that appellee has never been served with a copy of the record on appeal and is unable to refer specifically to any portion of the record.

II.

STATEMENT OF THE CASE.

Appellant was indicted together with three other persons on May 2, 1956, in the Southern District of California, Central Division. The indictment was in four counts. Appellant was charged in counts three and four only. Count three charges appellant with commission of a substantive offense, the sale of a narcotic drug, and count four charges him and others with a conspiracy to receive, conceal, sell and transport heroin.

On July 26, 1956, the jury found appellant guilty of the offense charged in counts three and four. The court, on August 13, 1956, committed appellant to the custody of the Attorney General for two years and imposed a fine in the sum of \$1.00 on count three, and on count four, committed appellant for four years and imposed a fine in the sum of \$1.00. With respect to the four-year term of imprisonment on count four, said period of imprisonment was ordered to run consecutively to the two-year period imposed on count three, "so that the total period of imprisonment shall be six years."

The Motion of appellant dated January 18, 1957, to correct illegal sentence, was denied by the Honorable Ben Harrison on January 30, 1957, without formal notice being served upon the United States Attorney and without hearing thereon, which is in accordance with the authority contained in Section 2255, Title 28, United States Code, where "the files and records of the case conclusively show that the prisoner is entitled to no relief, . . .".

On January 31, 1957, said Memorandum Opinion was filed.

The appeal was filed on February 26, 1957.

III-A.

STATUTES INVOLVED.

Appellant was indicted, in count three, for a violation of United States Code, Title 21, Section 174, which provides in pertinent part as follows:

“Whoever fraudulently or knowingly . . . sells, or in any manner facilitates the sale of any . . . narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law . . .”

shall be guilty of an offense.

Appellant was also indicted, in count four, for a violation of United States Code, Title 18, Section 371, which provides in pertinent part as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner, or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . .”

guilty of an offense.

III-B.

COUNTS INVOLVED.

In his Opening Brief appellant has inadvertently erroneously deleted and altered portions of counts three and four of the indictment. These counts are correctly stated as follows:

COUNT THREE: “On or about April 15, 1956, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Alfred Avery Reeves, Warren Lonnel Harris, and Richard Allen Black, after importation,

did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately 1 ounce, 69 grains of heroin, to Ralph M. Frias, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law.

COUNT FOUR: "Beginning on or about April 15, 1956, and continuing to the date of the return of this indictment, defendants Alfred Avery Reeves, Warren Lonnel Harris, and Richard Allen Black did agree, confederate, and conspire together and with other co-conspirators unknown to the grand jury to commit offenses against the United States, as follows: to knowingly and unlawfully receive, conceal, sell, and transport and facilitate the concealment, sale, and transportation of, a certain narcotic drug, namely, heroin, and knowingly assist in so doing, which said heroin had theretofore been unlawfully imported into the United States as the defendants then and there well knew:

"To effect the objects of said conspiracy the defendants and other co-conspirators unknown to the grand jury committed divers overt acts in the Central Division of the Southern District of California among which were the following:

"(1) On or about April 15, 1956, defendant Alfred Avery Reeves had a conversation with one Ralph M. Frias in Bard's Parking Lot at Adams Boulevard and Victoria Avenue, Los Angeles, California;

"(2) On or about April 15, 1956, defendants Richard Allen Black and Alfred Avery Reeves engaged in a conversation at Mitchell's Delicatessen at Buckingham Road and Adams Boulevard, Los Angeles, California;

“(3) On or about April 15, 1956, at Los Angeles, California, defendant Richard Allen Black engaged in a telephone conversation with Ralph M. Frias;

“(4) On or about April 15, 1956, Ralph M. Frias delivered to defendant Alfred Avery Reeves the sum of \$600.00 at Bard’s Parking Lot, Adams Boulevard and Victoria Avenue, Los Angeles, California; and

“(5) On or about April 15, 1956, in Los Angeles, California, defendant Warren Lonnel Harris had in his possession the sum of \$550.00.”

IV.

ARGUMENT.

Appellant appeals from denial of his motion to correct illegal sentence. In essence, he contends that the imposition of consecutive sentences of two and four years on counts three and four of the indictment respectively, or a total period of imprisonment of six years, “exceeded the trial court’s jurisdiction and was in violation of the Constitutional Amendment barring double jeopardy.”

A.

The Commission of a Substantive Narcotic Offense and of a Conspiracy to Commit a Narcotic Offense Are Separate and Distinct Offenses.

“It is apparent from a reading of Section 37, Crim. Code (Section 5440, Rev. Stat.), and has been repeatedly declared in discussions of this Court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.” (Citations.)

United States v. Rabinowich, 238 U. S. 78, 85.

“It has long been recognized by the Federal Courts, that the commission of the substantive offense and

the conspiracy to commit such are separate and distinct offenses.”

Toliver v. United States (C. C. A. 9th), 224 F. 2d 742, 744 (3).

Accord:

Pereira v. United States, 347 U. S. 1;

Pinkerton v. United States, 328 U. S. 640;

United States v. Rabinowich, *supra*;

Blumenthal v. United States (C. C. A. 9th), 158 F. 2d 883.

In count three of the instant Black case, appellant was convicted of a substantive offense, *i.e.*, the sale of a narcotic drug. He was also convicted of a narcotic conspiracy in count four. Counts three and four are separate and distinct offenses.

B.

Conviction for the Substantive or Objective Offense Does Not Bar Conviction for the Conspiracy to Commit the Substantive Offense.

The trial court cites *Kramer v. United States* (C. C. A. 9th), 147 F. 2d 202, in its Memorandum Opinion. Appellant, acting in *propria persona*, misconstrues the holding in the *Kramer* case and erroneously apparently believes that because the court in the *Kramer* case chose to impose concurrent sentences that the *Kramer* case is authority requiring concurrent rather than consecutive sentences.

Of course, Federal Courts have full power to impose cumulative or consecutive sentences. *United States v. Remus*, 12 F. 2d 239, certiorari denied, 271 U. S. 689.

C.

It Is Not Double Jeopardy to Convict for the Substantive Offense and for the Conspiracy Although the Overt Act of the Conspiracy Is Also the Basis for the Substantive Count.

The same evidence may prove both offenses but this does not make the substantive and conspiracy offenses identical. It is the unlawful agreement and not the overt act which is punished in the conspiracy. That the overt act is also a substantive offense, a sale of heroin, does not result in double punishment.

Toliver v. United States, supra, p. 744 (5).

The plea of double jeopardy is no defense to a conviction for both substantive and conspiracy offenses.

Pinkerton v. United States, supra, pp. 643 and 644.

D.

The Test of Double Jeopardy Is Whether or Not Each of the Two Offenses Requires Proof of a Fact Which the Other Does Not Require.

Where two offenses are charged having relation to the same matter or transaction there is no double jeopardy if each offense requires proof of a fact which the other does not require.

Matthews v. Swope (C. C. A. 9th), 111 F. 2d 697, 699.

The unlawful sale of heroin charged in count three, requires proof that appellant knowingly sold a narcotic drug (21 U. S. C. 174).

A conspiracy, as proscribed by 18 U. S. C. 371, requires that two or more persons conspire or agree to commit an offense against the United States and do any

act to effect the object of the conspiracy. No sale of heroin need be proved but more than one culpable person must be involved to constitute an unlawful agreement or conspiracy.

Count three required proof of a sale; count four required proof of an agreement between two or more persons. The offenses alleged in counts three and four each required proof of a fact which the other did not require and there was no double jeopardy involved.

E.

The Continuing Offense and Lesser Included Offense Theories Are Inapplicable.

Appellant discusses at great length cases concerning subsequent prosecution of lesser included offenses such as bigamy included within unlawful co-habitation and the "continuous or continuing offense" holding in *United States v. Universal Corp.*, 344 U. S. 218, 222. The *Universal* case holds that a single course of conduct does not constitute more than one substantive offense under Section 15 of the Fair Labor Standards Act. The Court considered and determined that thirty-two alleged substantive counts are in fact one continuing substantive offense and that this construction of the Act most properly effectuates the intention of Congress when it passed the Fair Labor Standards Act. Whether or not a conspiracy count under Section 371 of Title 18, United States Code, would have been appropriate was not considered by nor before the court in the *Universal* case. It therefore is not authority contrary to the position of appellee.

Even if appellant had been convicted of thirty-two substantive narcotic counts appellant would fare no better under the *Universal* decision. This court recently rejected the so-called "single transaction" rule with respect

to narcotic violations in *Harry Morris Sherman v. United States of America* (C. C. A. 9th), 241 F. 2d 329, 334, which holds that each sale is a separate violation. The other cases cited by appellant do not hold it improper to prosecute a substantive violation in one count and an unlawful conspiracy in another count even though but one sale is involved.

CONCLUSION.

It is respectfully submitted that a sale and a conspiracy are separate offenses, that conviction for one does not bar conviction for the other and is not double jeopardy.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant United States Attorney,
Chief, Criminal Division,*

JOSEPH F. BENDER,
*Assistant United States Attorney,
Attorneys for Appellee.*

No. 15611

United States
Court of Appeals
for the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant.

vs.

WESTFAL-LARSEN & CO., GENERAL STEAM-
SHIP COMPANY and BJARNE SELLE-
VALD,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

AUG 27 1957

PAUL P O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Respondents & Appellees.

In the District Court of the United States in and for
the Northern District of California, Southern
Division

No. 27475

HARRY L. MARSHALL, JR.,

Plaintiff,

vs.

WESTFAL-LARSEN & CO., a Corporation; GEN-
ERAL STEAMSHIP COMPANY, a Corpora-
tion, and BJARNE SELLEVALD,

Defendants.

COMPLAINT TO RECOVER
FOR PERSONAL INJURIES

Harry L. Marshall, Jr., in a cause of contract and
damage, civil and maritime, alleges:

I.

Plaintiff is a resident of the City and County of
San Francisco, within the Northern District of Cali-
fornia, Southern Division.

II.

On or about December 17, 1954, defendant West-
fal-Larsen & Co., was the owner, the defendant
General Steamship Company, was the operator and
defendant Bjarne Sellevald, was the master of that
certain vessel known as M. S. Hardanger.

III.

On or about February 1, 1955, said vessel was em-
ployed in foreign commerce.

IV.

Sometime prior to December 17, 1954, at San Francisco, California, the defendants agreed to transport plaintiff and plaintiff, pursuant to said agreement, became a passenger on said vessel on or about December 17, 1954.

V.

Transportation of plaintiff by the defendants was conducted by the defendants as a regular scheduled transportation as a common carrier for hire.

VI.

On or about February 1, 1955, the plaintiff, while a passenger of said vessel, suffered severe personal injuries when he fell while debarking from said vessel at Corral, Chile. Plaintiff's said injuries were caused by the negligence and carelessness of the defendants, their agents, servants, officers and employees, in that they failed to furnish plaintiff with a safe means of debarking from said vessel during a temporary stop-over at Corral, Chile, and failed to take reasonable measures to safeguard plaintiff when plaintiff was debarking at said time and place in that they failed to provide competent officers and employees to superintend and supervise the debarking of passengers at Corral, Chile, even though said defendants, their agents, servants, officers and employees, knew or should have known, that plaintiff intended to, and was in the act of debarking from said vessel at said time and place, and

as a result thereof plaintiff fell while debarking from said vessel at Corral, Chile.

VII.

By reason of the premises, plaintiff suffered a torn ligament and cartilage of the left knee and was otherwise rendered sick, sore, lame and disabled and has suffered, and will in the future suffer, great pain and disability; and in connection with said injuries has expended the sum of \$1,218.43 for the services of doctors, nurses and hospitals to treat the injuries sustained by plaintiff, which said sum is the reasonable value for the services so rendered to plaintiff for said injuries.

VIII.

The matters herein alleged are within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

IX.

Plaintiff is informed and believes, and therefore alleges, that defendant Westfal-Larsen & Co. is, and at all times herein mentioned was, a corporation qualified to do business in the State of California, and has an office for the purpose of transacting business in this District.

X.

Plaintiff is informed and believes, and therefore alleges, that defendant General Steamship Company is, and at all times herein mentioned was, a corporation qualified to do business in the State of California and has an office for the purpose of transacting business in this District.

XI.

By reason of the premises aforesaid and as a direct and proximate result thereof and in addition to the special damages heretofore alleged, plaintiff has been generally damaged in the sum of \$15,000.00.

As and for a Second, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff refers to paragraphs I, II, III, V, VI, VII, VIII, IX, X and XI of the first cause of action herein and by this reference incorporates said paragraphs, and each of the allegations thereof, in this, the second cause of action, as though said paragraphs and the allegations therein were expressly and fully set forth in haec verba herein.

II.

Sometime prior to December 17, 1954, the defendants agreed to transport plaintiff safely from Los Angeles, California, around South America and return to Los Angeles and plaintiff, pursuant to said agreement became a passenger in said vessel on or about December 17, 1954.

Wherefore, Plaintiff prays that the defendants be required to appear and answer, all and singular, the matters aforesaid and that this Court make and enter its decree awarding plaintiff damages in the sum of \$16,218.43, together with costs, and that plaintiff have such other and further relief as the Court may deem meet and proper in the premises.

Dated : October 31st, 1955.

/s/ MORSE ERSKINE,

ERSKINE, ERSKINE &

TULLY,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 18, 1957.

[Title of District Court and Cause.]

ANSWER

Westfal-Larsen & Co., a corporation, answering unto the complaint herein, admits, denies and alleges:

I.

Admits the allegations of Paragraph I.

II.

Denies each and every allegation of Paragraph II except admits that defendant Westfal-Larsen & Co. was the owner and operator of the MS Hardanger, and Bjarne Sellevold was the master.

III.

Admits the allegations of Paragraph III.

IV.

Admits the allegations of Paragraph IV, and in this behalf alleges that the agreement to transport

plaintiff was contained in a contract passage ticket issued to and binding upon plaintiff.

V.

Denies each and every allegation of Paragraph V except admits that transportation of plaintiff was conducted under and pursuant to the terms of the contract passage ticket.

VI.

Denies each and every allegation of Paragraph VI except admits plaintiff injured his left knee on or about February 1, 1955, when he jumped from said vessel to a barge at Corral, Chile.

VII.

Denies each and every allegation of Paragraph VII except admits plaintiff injured his left knee.

VIII.

Admits the allegations of Paragraph VIII.

IX.

Denies each and every allegation of Paragraph IX.

X.

Admits the allegations of Paragraph X.

XI.

Denies each and every allegation of Paragraph XI and further denies plaintiff has been generally or otherwise damaged in the sum of \$15,000, or any sum, or at all.

Answering Unto Plaintiff's Separate, Second and Distinct Cause of Action, Defendant Westfal-Larsen & Co. Admits, Denies and Alleges:

I.

Defendant refers to Paragraphs I, II, III, V, VI, VII, VIII, IX, X and XI of its answer to the first cause of action herein and by this reference incorporates herein said paragraphs and each of the admissions, denials and allegations thereof.

II.

Denies each and every allegation of Paragraph II except admits defendant agreed to transport plaintiff as a passenger pursuant to the terms and limitations of a contract passage ticket issued to plaintiff.

And for a Further, Separate and Second Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That any accident or injuries suffered by plaintiff at or about the time or place alleged in the complaint were caused by and/or contributed to by the carelessness and negligence of plaintiff and plaintiff was careless and negligent in that he placed himself in a position of danger and failed to exercise due or any care for his own safety at the time and place alleged in the complaint.

And for a Further, Separate and Third Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That the rights of the plaintiff in respect to any accident or injuries occurring to plaintiff during and about the time and place alleged in the complaint were limited to and controlled by the terms and provisions of the contract passage ticket issued to plaintiff, and that by virtue of said terms and provisions there is no liability of this defendant to plaintiff.

And for a Further, Separate and Fourth Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That plaintiff was a passenger on said vessel under and pursuant to the terms and limitations of the contract passage ticket issued to plaintiff and that as such passenger and pursuant to said contract plaintiff accepted and bore the risk of transfer between vessel and shore and vessel and vessel.

And for a Further, Separate and Fifth Answer and Defense to the Complaint and to Each Cause of Action, Defendant Westfal-Larsen & Co. alleges:

I.

That plaintiff was a passenger on said vessel under and pursuant to the terms and limitations of

the contract passage ticket issued to plaintiff and that under said contract plaintiff agreed that even in the event of liability for injury the damages recoverable should not exceed \$5,000 unless plaintiff paid an increased amount or percentage at the time the ticket contract was purchased; that plaintiff did not pay said increased amount of percentage and in the event of defendant's liability hereunder plaintiff is limited to his actual damages, not exceeding \$5,000.

Wherefore, defendant prays that plaintiff take nothing by his complaint herein, that defendant be dismissed with judgment for its costs of suit herein incurred, and for such other and further relief as in law and justice they may be entitled to receive.

LILLICK, GEARY, OLSON,
ADAMS & CHARLES,

/s/ EDWIN L. GERHARDT,
Attorneys for Defendant
Westfal-Larsen & Co.

State of California,
City and County of San Francisco—ss.

Edwin L. Gerhardt, being first duly sworn, deposes and says:

That he is a member of the firm of Lillick, Geary, Olson, Adams & Charles, attorneys for Westfal-Larsen & Co., defendant in the within action; that the office of said attorneys is within the City and County of San Francisco; that this verification is

made by affiant for the reason that there is no officer of said defendant within the City and County of San Francisco; that he has read the within Answer and knows the contents thereof; that the same is true of his knowledge except as to matters alleged upon information and belief, and as to those matters he believes it to be true.

/s/ EDWIN L. GERHARDT.

Subscribed and sworn to before me this 19th day of March, 1956.

[Seal] /s/ IRENE M. WOOD,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires June 23, 1958.

[Endorsed]: Filed February 18, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial before the court sitting without a jury the Libelant Harry L. Marshall, Junior, appearing by Erskine, Erskine & Tulley by Morse Erskine, Esq. and Respondent Westfal-Larsen & Co., appearing by Lillick, Geary, Wheat, Adams & Charles by Edwin L. Gerhardt, Esq. and evidence both oral and documentary having been introduced the matter having been argued

and the cause submitted for decision, the Court having been fully advised in the premises now makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. When the Complaint in this action was filed it was docketed by mistake as a civil action; and so at the commencement of the trial the court on motion ordered that it be transferred to the admiralty side of the court. On the pleading the parties are designated "Plaintiff" and "Defendant." To conform to the practice in this District they should have been designated "Libelant" and "Respondent" and therefore they are so designated in the latter manner in these Findings and in the Decree to be made pursuant to these Findings.

2. At all times herein Libelant was a resident of the City and County of San Francisco within the Northern District of California, Southern Division.

3. At all times herein Respondent Westfal-Larsen & Co. owned and operated the MS Hardanger which was employed in foreign commerce.

4. This matter is at issue only between Libelant and Respondent Westfal-Larsen & Co. and not at issue between Libelant and General Steamship Company, Bjarne Sellevold and the latter two parties are dismissed.

5. Respondent Westfal-Larsen & Co. was a common carrier for hire.

6. On February 1st, 1955, Libelant was a passenger on said vessel pursuant to contract passenger's ticket No. 0045. On said day said vessel was anchored at Corral, Chile. During the early morning of said day Libelant and the Master, Bjarne Sellevald, left said vessel to go ashore via a small tug. At the time of disembarking the gangway of said vessel was so rigged as to permit access to a barge on the portside of said vessel. In order to reach the shore tug it was necessary to descend said gangway to the barge and cross the barge to the tug.

7. At the time the weather was clear and dry. There was a swell to the sea and therefore the barge was moving up and down under said gangway from two to three feet. Libelant was aware of these conditions.

8. As Libelant descended the gangway the Captain was behind him. Mr. Nordfonn and Mr. Nilsen, two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel. Assistance was available to Libelant in reaching the barge, if he wished it. When Libelant reached the lower platform of said gangway Mr. Nilsen called to him "Don't jump." Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest.

9. Libelant jumped at right angles to the vessel and in a direction across the barge, but when he landed he was at an angle somewhat facing the hold. He was then pitched by the movement of the barge

to his left. Libelant in order to avoid being thrown down the forward hold of the barge turned sharply twisting his left knee and sustained injuries to his left knee consisting of a tear of the anterior cruciate ligament. He proceeded across the barge to the tug with the Captain and went ashore where he received medical attention. Libelant then returned to the vessel.

10. Libelant admitted to Captain Sellevald and Chief Officer Kaldefoss that the accident was his fault.

11. Libelant subsequently left the vessel at Buenos Aires for medical attention and then returned to San Francisco by plane. Libelant was reimbursed for the remaining unused portion of his passage ticket.

12. An operation was performed to Libelant's knee on March 7th, after he returned to San Francisco and a tear of the anterior cruciate ligament was repaired. Libelant fully recovered from said operation and has no further disability. Libelant's special damages amount to \$1,218.43.

13. Libelant in disembarking from said vessel did not exercise the care of a reasonably prudent person.

14. Libelant has failed to prove and it is not true that Respondent failed to furnish Libelant with a safe means of disembarking from said vessel at Corral, Chile.

15. Libelant has failed to prove and it is not true that Respondent failed to take reasonable meas-

ures to safeguard Libelant while he was disembarking at Corral, Chile.

16. Libelant has failed to prove and it is not true that Respondent failed to provide efficient officers and employees to superintend and supervise his disembarking at Corral, Chile.

17. Such injuries as Libelant received were proximately caused by and the result of his own negligence.

18. Libelant's accident or injury was in no way caused or contributed to by any unseaworthiness of the MS Hardanger.

19. Libelant's accident or injury was in no way caused or contributed to by any negligent act or omission of Respondent, its agents, master, officers, crew or employees.

Conclusions of Law

1. This matter is within the Admiralty and Maritime jurisdiction of this Court and the Court has jurisdiction of the parties.

2. Libelant has not sustained his burden of proof.

3. Respondent has not breached any duty of care owed to Libelant.

4. Libelant's injuries were in no way caused by or contributed to by any unseaworthiness of the MS Hardanger, its appliances, appurtenances and equipment.

5. Libelant's injuries were in no way caused or contributed to by any negligent act or omission of Respondent, its agents, master, officers, crew or employees.

6. The proximate and controlling cause of Libelant's injuries was Libelant's own negligence and carelessness.

7. Libelant is not entitled to recover any damages from Respondent.

By Reason Whereof a decree should be entered that Libelant take nothing from Respondent, that judgment be entered against Libelant and in favor of Respondent, each of the parties paying his or its own costs.

Dated May 8, 1957.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to form:

/s/ MORSE ERSKINE,
ERSKINE, ERSKINE &
TULLEY,
Proctors for Libelant.

LILLICK, GEARY, WHEAT,
ADAMS & CHARLES,
Proctors for Respondent.

[Endorsed]: Filed May 8, 1957.

Entered May 9, 1957.

In the United States District Court for the
Northern District of California, Southern
Division

No. 27475

HARRY L. MARSHALL, JR.,

Libelant,

vs.

WESTFAL-LARSEN & CO., a Corporation;
GENERAL STEAMSHIP COMPANY, a Cor-
poration, and BJARNE SELLEVALD,

Respondents.

DECREE

The above-entitled matter having come on regularly for trial before The Honorable Michael J. Roach and the Libelant, Harry L. Marshall, Jr., having appeared in person and by Erskine, Erskine & Tulley by Morse Erskine, Esq., and the Respondent Westfal-Larsen & Co., having appeared by Lillick, Geary, Wheat, Adams & Charles by Edwin L. Gerhardt, Esq., Proctors for Respondent, and evidence both oral and documentary having been introduced and the matter having been argued and the cause submitted for decision, the Court having been fully advised in the premises made, signed, ordered and filed herein the findings of fact and conclusions of law which are by reference made a part hereof.

Now Therefore by reason of the law and the evidence and upon the findings of fact and conclusions of law herein;

It Is Hereby Ordered, Adjudged and Decreed that Libelant Harry L. Marshall, Jr., take nothing from the Respondent Westfal-Larsen & Co., and that Judgment be entered against said Libelant and in favor of Respondent and that the respective parties pay their own costs.

Dated May 8, 1957.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to form:

/s/ MORSE ERSKINE,
ERSKINE, ERSKINE &
TULLEY,
Proctors for Libelant.

LILLICK, GEARY, WHEAT,
ADAMS & CHARLES,
Proctors for Respondent.

[Endorsed]: Filed May 8, 1957.

Entered May 9, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Harry L. Marshall, libelant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 9th day of May, 1957.

Dated: May 31, 1957.

/s/ MORSE ERSKINE,
ERSKINE, ERSKINE &
TULLEY,
Attorneys for Libelant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1957.

[Title of District Court and Cause.]

ORDER FOR THE TRANSMISSION
OF EXHIBITS

It appearing that the libelant in the above-entitled action has appealed to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered against libelant in the above-entitled action; and it appearing to this court that the original exhibits introduced in evidence upon the trial of said action, or marked for identification therein, should be inspected by said Court of Appeals.

Now, Therefore, It Is hereby Ordered that the Clerk of this court, upon transmitting to said Court of Appeals the record on appeal in said action, shall transmit to said Court of Appeals for use upon said appeal all said exhibits, and that when said appeal shall have been decided, said Clerk shall obtain said exhibits from the Clerk of said Court of Appeals so that the same can again be filed in this court.

Dated: June 24, 1957.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

[Endorsed]: Filed June 24, 1957.

In the United States District Court for the
Northern District of California, Southern
Division

In Admiralty No. 27475

HARRY L. MARSHALL, JR.,

Libelant,

vs.

WESTFAL-LARSEN & CO., a Corporation;
GENERAL STEAMSHIP COMPANY, a Cor-
poration, and BJARNE SELLEVALD,

Respondents.

PROCEEDINGS OF TRIAL

February 18, 1957

Appearances:

For the Libelant:

ERSKINE, ERSKINE & TULLEY, by
MORSE ERSKINE, ESQ.

For the Respondents:

LILLICK, GEARY, WHEAT, ADAMS &
CHARLES, by
EDWIN L. GERHARDT, ESQ.

The Clerk: Harry L. Marshall vs. Westfal-Larson & Co. for trial.

Mr. Erskine: Ready for the plaintiff, your Honor.

Mr. Gerhardt: Ready for the defendant, your Honor.

The Court: Proceed, gentlemen.

Mr. Erskine: Well, your Honor, I wasn't going to raise this point at this time, but Mr. Gerhardt suggested I should do so. I know it will come up some time during the course of the trial, and as long as he wants me to raise it now, I might as well do so.

The complaint that was filed here was given a Civil number, but it was commenced as an action in Admiralty—suit in Admiralty. It alleges at the beginning of it that this is in a cause “Harry L. Marshall, Jr.,” a cause of contract and damage, civil and maritime. Then it goes along to allege in accordance with the Admiralty Rules the places of residence of the parties, it alleges the jurisdictional fact, which is that the plaintiff, Mr. Marshall, was injured while on a ship, the Hardinger, owned by the defendant Westfal-Larson; and then it alleges that the matters herein alleged are within the Admiralty and Maritime jurisdiction of the United States and this Honorable Court.

That allegation is admitted by the answer. So, at this time, if the Court please, I will ask that this action be transferred from the Civil to the Admiralty side of the court. [2*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: No objection?

Mr. Gerhardt: If your Honor please, this action was filed on the Civil side of the court but contained allegations of Admiralty and Maritime jurisdiction. However, being on the Civil side of the court, and jury having been demanded, when the matter came on for trial there was a stipulation between counsel that the jury could be deemed waived. It therefore remained a case on the civil side of the docket, which was to be tried before a judge alone.

Now, it makes considerable difference in this case, your Honor, whether it is heard as a maritime case or whether it is heard as a Civil case, for this reason:

If after the testimony is presented your Honor should determine that the sole proximate cause of the injury was Mr. Marshall's own negligence, that determination, whether made as wearing Civil robes or Admiralty robes, would terminate the case, and that determination could be made on either side of the court.

If, however, the Court should decide that there was any negligence on the part of the vessel, but that Mr. Marshall was contributorily negligent, then it does make this difference:

If the Court should hear that matter on the Civil side of the court, the contributory negligence of Mr. Marshall could well be a complete bar to any recovery. If, however, it was heard on the Admiralty side of the court, the [3] contributory neg-

ligence of Mr. Marshall would merely result in a reduction or mitigation of the damages.

That is why it is very important to determine in advance whether this matter is going to be heard as a Civil case or as an Admiralty case.

Now, I have conducted considerable research of the authorities, your Honor, and I must admit that in practically all of the cases the transfer from one side of the court to the other is a matter which is within the discretion of the trial court, and I will respectfully have to abide by whatever ruling the Court makes; but I do not consent to the motion that is made and must object to it on a formal basis.

The Court: Well, if you are both agreed that it is a matter of discretion, I am prepared to exercise that discretion. I know nothing about the factual situation, so either side can't be prejudiced.

Mr. Erskine: The intention is clearly stated in the complaint that it was an Admiralty case. It was a mistake that it was filed on the Civil side.

Do I understand that the Court has ruled to transfer it to the Admiralty side?

The Court: So ordered.

Mr. Erskine: Thank you. May I make an opening statement now, your Honor?

The Court: You may. [4]

Mr. Erskine: This is an action by the plaintiff to recover damages for injuries suffered by him while he was a passenger aboard the steamship owned by the defendant Westfall-Larson. The injuries consisted of an injury to his knee which I will describe later on.

The plaintiff boarded the steamship, the Hardinger, the ship of the defendant Westfall-Larson, in Los Angeles, about December 18, 1954. He bought a ticket to travel on this ship down the west coast of South America, through the Straits of Magellan, up the east coast, through the Canal, and back to Los Angeles. In other words, he bought a round-trip ticket. He bought it to go away on a pleasure trip, a vacation.

The ship was to stop on the way down the west coast and up the east coast at various ports, and he, with the other passengers aboard the ship, anticipated getting off at the various places at which the ship would stop in order to see the sights and to learn something about the people and their country at each of these places.

The ship was a freighter. That was its main work, to carry freight. It did, however, carry 12 passengers, of whom the plaintiff was one.

When the vessel would stop at one of these ports of call, it would sometimes stop at a dock where there was a pier. It would dock at a pier where a pier existed at the port of call. But at some of these foreign ports of call there was [5] no dock, and the steamer in those cases would anchor in the harbor, and the passengers when they would go ashore on their sight-seeing would go ashore by means of a shore boat. The shore boat would call at the side of the steamer, the gangway would be let down, and the passengers would get from the gangway onto the shore boat, being helped in moving from the

gangway to the shore boat by officers or members of the crew.

The steamer arrived at a place called Corral. It is a small port in the southern part of Chile. It arrived there about January 29th of 1955. And there being no pier at that place at which a ship of this size could dock, the ship anchored in the harbor.

The passengers went ashore on the 30th and 31st, I believe, and then the first of February arrived. That was the date on which this accident occurred—first of February, 1955. Mr. Marshall and the captain of the ship, Captain Sellevald, had a conversation with one another the night before February 1st. The captain told Mr. Marshall that he was going up to a place called Valdivia, about four or five miles, or perhaps farther, up the river which emptied into the sea at Corral, and he, Marshall, suggested he go with the captain on this trip, or whether the captain asked him to go with him, whether the captain was the one who suggested it, is doubtful according to the testimony.

But at any rate, the captain did say to Marshall, "I would [6] like to have you go with me on this trip up to Valdivia tomorrow morning. We will leave at approximately 7:30 or 7:00 o'clock, probably 7:30, and I will make arrangements for the shore boat to pick us up and take us to shore."

Pursuant to that arrangement the captain and Marshall had breakfast together at 7:00 o'clock on February 1st, and then Marshall went to his cabin for a few minutes and then he went out to the

head of the gangway to go down to the shore boat that was to pick them up.

Now, before I go any further, your Honor, with this statement of what we propose to show, I would like to tell you very briefly the legal theory upon which we are trying this case:

The theory is that a carrier is not an insurer of the safety of its passengers; but it has to exercise the highest degree of care in protecting and safeguarding.

I would like to just pause a minute and read the rule that is stated by the authorities in this connection.

“A carrier of passengers is not an insurer, but does owe the duty to exercise the very high degree of care for the safety of its passengers. A passenger is entitled to have a carrier exercise for his safety as much skill and care and prudence as an exceedingly competent and cautious man would bring to the task of like circumstances, and is liable for injuries to [7] passengers due solely from a failure to do that.” That was from *Moore vs. American Scantic Line*, in 121 Fed. 2d 767 at page 782, decision by Judge Learned Hand, I would like to read one more short extract:

“It was the duty of the master to protect those passengers from harm with the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in similar circumstances.” That is *Voltmann vs. United Fruit Company*, in 147 Fed. 2d 515.

So that is the general rule, that the carrier must

exercise a very high degree of care; that the captain must use the care to protect his passengers of an exceedingly prudent and cautious man.

We also say, if the Court please, that under the law the defendant here had the duty to protect these passengers, reasonably to protect them, in leaving the ship to go ashore; and it was obliged not only to perform that general duty, but it was obliged to supply men, officers or men of the steamer, to aid the passengers in getting from the gangway onto the shore boat or whatever method they were to leave the ship. And it was required to perform that duty of safeguarding the passengers with this highest degree of care imposed upon it by the law.

Now, those are the principles upon which we rely in trying [8] this case.

Getting back to what we propose to show, when Marshall arrived at the head of the gangway on February 1st of 1955, he found Captain Sellevald and the first officer, Kaldefoss, talking with one another at the head of the gangway, and he stepped out—he said, “Good morning” to the first officer and stepped out onto the upper platform of the gangway.

Now, I have agreed with Mr. Gerhardt, if the Court please, to use this sketch of the vessel, the gangway and the barge which is involved in this case, on this trial. The sketch was prepared upon the scale of one-eighth of an inch equals a foot.

Can your Honor see it there?

The Court: For all purposes I can see it.

Mr. Erskine: Do you have something in the nature of a ruler that I can point with?

The Court: There is a pointer down there.

Mr. Erskine: Mr. Marshall stepped out onto the upper platform of the gangway and started down the stairs. He was followed by Captain Selvald. When he got about three-fourths of the way down the stairs, he became aware of the fact that the captain was not following him, but he had returned up the stairs to again talk to the first officer. So Marshall waited about three-quarters of the way down the gangway until the Captain had finished his brief conversation with the first [9] officer. The captain then started to descend again, and Marshall again started to descend until he got to the lower platform of the gangway. He paused a moment there.

The captain was about three or four steps up the gangway from him. There was this barge which was 100 feet long and about 20 or 25 feet wide, alongside the ship, about a foot and a half from the ship and under the gangway. Marshall saw the shore boat either tied up to the other side of the barge or coming into the barge at the time he was on the lower platform. The barge was about two or three feet below. The deck of the barge was about two or three feet below the lower platform of the gangway.

There was a swell or a wave. There were waves in the sea that were about three feet from the crest to the hollow of the wave, and those waves were

moving this barge about a foot and a half to two feet, two and one-half feet, up and down.

Now, that was the condition, that Marshall was on the lower platform of the gangway with the captain behind him. We will show that the First Mate of the ship testified that when a gangway is lowered above a barge in that position, that the lower platform of the gangway is fixed at a point where it is sufficiently high above the barge so that the motion of the sea will not raise the barge up to strike and injure the gangway. In other words, the lower platform of [10] the gangway is kept up far enough so that there is no danger that the barge will be lifted by a wave and strike the gangway.

We will show that no effort was made when Marshall was going down the gangway, or appeared to go down the gangway to get on the barge, no effort was made to lower the gangway so that it would be close to the deck of the barge. We will show that when he was going down the gangway with the captain behind him, no effort was made to get anybody onto the deck of the barge to help him down from the lower platform to the deck of the barge.

He was standing there looking at the deck of the barge and noticing the movement of the barge, with the captain immediately behind him, and the captain did not say a word to him; the first officer didn't say a word to him; and so he, not getting from anybody any directions, jumped from the lower platform of the gangway down to the deck of the barge.

Now, when he struck the deck of the barge, a

wave gave the barge a movement that caused him to pitch. He jumped directly out from the side, at right angles to the side of the ship, and he struck the deck about in here, near this forward hold. The forward hold was empty. There was what is called a coaming surrounding the forward hold about two feet high.

A coaming is a little fence-like structure that is built around open hatches of a ship. [11]

So he, jumping straight out, landed on the deck near this forward hold, and at the time he landed he was pitched by the movement of the barge, pitched over toward this coaming and over toward this empty hold that was about 15 to 20 feet deep, at least. He, in order to save himself, turned very sharply on his left knee.

He didn't strike the coaming, but he turned with his full strength and weight of his body on his left knee, and he was really bending over this coaming in order to save himself from falling down the hold, and he gave his left knee such a severe twist that he broke what they call the anterior cruciate ligament of his left knee. The anterior and posterior cruciate ligaments bind the thigh bone to the shin bone—the doctors say the “femur to the tibia.” It's a rope-like structure. I guess it's about as thick as that (demonstrating).

Marshall, in that turn to avoid being thrown down the hold, did break that ligament. Of course, he didn't know at that time that he had broken it, but that is what the evidence will show happened to him.

After making that twist he fell on his hands and knees on the deck. He didn't hurt himself in the fall at all. It was the twist of his body that broke the ligament. He got up feeling great pain. He got up and by that time the captain had jumped immediately following him, and the captain asked him whether or not he wanted to go back to the ship, and [12] Marshall said, "Well, there's no doctor aboard the ship. I better go ashore and see a doctor."

So they got in the shore boat and he went over to Corral, and then they left the shore boat at Corral and took a river boat that took them up to Valdivia. By the time they got to Valdivia, Marshall's knee was very, very badly swollen. It was full of blood. They went to a hospital at Valdivia. The doctor there aspirated the blood, that is, he stuck a needle into Marshall's knee and drew off the blood, and put the knee in a cast, and then Marshall was taken back to the ship.

The ship continued around through the Straits of Magellan to a place called Bahia Blanca, near Buenos Aires. A doctor came aboard there, took a look at Marshall's knee, again took off the blood, removed the cast, then Marshall and the steamer went up to Buenos Aires.

Marshall got off the steamer there and went up to the hospital there, and the doctor at the hospital diagnosed his trouble as either a broken cartilage or broken ligament, and he took an airplane from Buenos Aires back to San Francisco where he arrived about the first of March.

He went out to see Dr. King at the Stanford Hospital, and Dr. King then operated on his knee and found this broken cruciate ligament and repaired it by sewing it together, and Marshall then underwent considerable physiotherapy, and by July the 1st of 1955, his treatment was finished. [13]

He hasn't much residual difficulty with his knee. It is painful to the touch and he feels it at times of weather, but he now has complete use of his knee subject to those exceptions.

That is the case we propose to prove, if the Court please.

Mr. Gerhardt: May it please your Honor, Mr. Erskine has given quite a fair summary of the facts with about three exceptions, which are additions, actually, to the facts which he has stated.

First of all, I should like to correct an impression, or perhaps—I don't think it was a direct misstatement on Mr. Erskine's part, but he has stated there were three-foot waves. I think in this case, your Honor, the evidence will show that these were not waves in the ordinary sense of breaking waves. These were more harbor swells.

Mr. Erskine: Swells. Those are waves, but they are not breaking waves.

Mr. Gerhardt: Yes. Insofar as the diagram is concerned, your Honor, I do agree that that has been drawn to scale, but the distances used as the basis for the scale are merely approximations taken from the various witnesses. There may be a difference of a foot or two here or there, but it is primarily for illustration purposes that I understand

it is intended to be used, and I have stipulated that it is drawn to scale according to approximations given by various witnesses. [14]

Now, insofar as the statement was made that there was nobody on the barge——

Mr. Erskine: I didn't say that, Mr. Gerhardt. I said that neither the captain nor the first mate put anybody on the barge to help Marshall off the barge.

Mr. Gerhardt: Well, the evidence will show, your Honor, that Mr. Marshall denies there was anybody on the barge, denies that anybody on the barge spoke to him or gave him any warning whatsoever. The evidence of the respondent will, however, show that there were two men on the barge, located on this side of the barge, next to the side of the vessel, and within a few feet of the foot of the gangway. That these men were down there engaged in the job of painting and scraping the side of the vessel, using the barge as a floor from which to conduct those working operations.

The evidence will show that after Mr. Marshall came down and stood on the lower platform, and because of the movement of the barge, one of these seamen, whose name was Jan Nelson, warned Mr. Marshall not to jump. That Mr. Marshall, despite that warning, despite the statement from the seaman not to jump, nevertheless did so, and that it was Mr. Marshall's own action in jumping at that moment that caused his injury.

We will also show, your Honor, that in the conversation that Mr. Marshall had with the master and

the chief officer subsequent to his return to the vessel after receiving medical [15] treatment he admitted it was his own fault.

We will also show, your Honor, that there was a passage contract effected in this case, and that that contract was signed by Mr. Marshall, and that one of the terms of that contract was to the effect that passengers would all bear any risk of transfer between vessel and vessel or vessel and shore.

I think, your Honor, that with those modifications to Mr. Erskine's opening statement, otherwise the facts will be quite well along the lines that were stated.

Mr. Erskine: I have one remark—I don't know whether it will help your Honor, but I would like to say that we do not agree with Mr. Gerhardt's statement with respect to the position of these men on the barge or what was said to Mr. Marshall.

Our position with respect to the provisions of the ticket is that under the express statutes of the United States that provision is void as against public policy.

Now, Mr. Marshall, will you take the stand, please? [16]

HARRY L. MARSHALL

libelant herein. called as a witness in his own behalf: sworn.

The Court: Your full name, please.

A. Harry L. Marshall, Jr.

Direct Examination

By Mr. Erskine:

Q. Your address, Mr. Marshall?

A. 2677 Larkin Street.

Q. Just to pass over these preliminaries with leading questions, if counsel has no objection, you boarded the steamship Hardinger in Los Angeles about December 18, 1954, is that correct?

A. Yes, sir.

Q. You boarded her as a ship passenger?

A. Yes.

Q. You bought a passage on that steamer to go along through the Straights of Magellan?

A. Yes.

Q. You stopped at various ports of call on both the west and east coasts of South America?

A. Yes, sir.

Q. Now, you have prepared a statement of the ports at which you stopped while you were on this ship. I would like to show you this statement, Mr. Marshall, and ask you if that statement shows correctly the ports at which the steamer stopped while you were a passenger aboard her, and the [17] length of the stay of those places.

(Testimony of Harry L. Marshall.)

Mr. Erskine: I will show it to you as soon as he examines it, counsel.

The Witness: Yes, Mr. Erskine, that's right. According to my records these are correct. It is a sort of a diary record, the ship's log I think would prove it.

Mr. Gerhardt: Mr. Marshall, is that based upon recollection?

A. No, no, this is based on the record of a passenger and he gave me a copy when I was aboard ship.

Mr. Gerhardt: No objection.

Mr. Erskine: I would like, if the Court please, in order to abbreviate this thing, to introduce this in evidence.

The Court: It may be admitted and marked.

(List referred to above admitted into evidence as Libelant's Exhibit 2.)

Mr. Erskine: It shows, if the Court please, that the steamer stopped at Buena Ventura, Colombia, December 28 to 30th; Manta, Ecuador, December 31st to January 1st; Para, Ecuador, January 2nd; Talara, Peru, January 3rd; Paita, Peru, January 3; Callo, Peru, January 5th to 9th; Iquique, Peru, January 12th; Antofagasta, Peru, January 14th; Valparaiso, Chile, January 17th and 18th; Corral, Chile, January 29th to February 3rd; Bahia Blanco, Argentina, February 9th to 14th; and Buenos Aires, Argentina, February 16th. [18]

Q. (By Mr. Erskine): Now, Mr. Marshall, you

(Testimony of Harry L. Marshall.)

arrived at Corral, then, this port in Chile, around January 29th, is that correct? A. Yes.

Q. And did you and the other passengers go ashore at Corral prior to February 1st, 1955?

A. Yes.

Q. When the steamer stopped at Corral, did she dock at a pier or was she out in the harbor?

A. She was in the harbor at anchor.

Q. Have you any idea how far off shore she was?

A. Oh, I think it's about a quarter of a mile.

Q. And when you and the passengers went ashore prior to January 1st, how did you go ashore?

A. A little shore boat would come up alongside the gangplank and we would step on the gangplank and onto the little shore boat.

Q. And you were taken ashore that way?

A. That is right.

Q. Do you remember going ashore in Corral on February 1st? A. Yes.

Q. Did you have a conversation with the Captain of the vessel on the evening preceding February 1st? A. Yes, sir.

Q. What was the name of that Captain? [19]

A. Captain Sellebole.

Q. Captain S-e-l-l-e-b-o-l-e, is that right?

A. Yes.

Q. Where did you have that conversation with him, Mr. Marshall?

A. It's not exactly clear, but I think it was in

(Testimony of Harry L. Marshall.)

my cabin. He often came into my cabin and I would go into his cabin.

Q. That was after dinner?

A. That was after dinner, I believe.

Q. Was anybody else there besides you and the Captain? A. No, sir.

Q. Tell us what that conversation was.

A. Well, he told me he was going up to Valdivia, which was up the Valdivia River from Corral about 8 or 10 miles. He was going up early in the morning to see the agent there, and he was planning to stop for lunch either going or coming down at a farm there owned by some Dutch people who were friends of his.

Well, I showed an interest in it. Whether he invited me before I showed the interest, I don't know, but anyway it was arranged that I was to have an early breakfast with him an hour before the passengers, in the dining salon, and he would arrange for a boat and we would go ashore and get the regular boat up to Valdivia. So I was to meet him next morning at the dining salon at 7 o'clock. [20]

Q. And what time did he tell you you would leave the ship? A. 7:30.

Q. When the steamer was not docked at a pier but was anchored as the Hardinger was at Corral out in the harbor, did it take on and unload freight?

A. That's correct.

Q. When it was anchored in the harbor in that fashion, how did it load and unload freight?

A. It was the common practice that large barges

(Testimony of Harry L. Marshall.)

would come out from the mainland or the shore and tie up to the boat, and then they would come up into place when they were ready to load or unload into the hold. In the meantime, they would be back from the hold or out from the ship.

Q. In other words, barges would come up to the ship and the freight would be loaded and unloaded on and off of barges, is that correct?

A. That's correct.

Q. And that was the situation at Corral on the morning of February 1st? A. That's correct.

Q. There were barges out alongside the ship, is that correct?

A. We were practically surrounded with barges on both sides of the ship.

Q. Now, you had breakfast with the Captain on the morning of February 1st? [21] A. Yes.

Q. Pursuant to the arrangement? A. Yes.

Q. At 7:00 o'clock? A. Yes.

Q. Then what did you do after breakfast?

A. I went to my cabin just for a few minutes to get ready to go ashore, and I told the Captain I would meet him up on deck, which I did. I arrived up on deck about 7:30. He was talking to the First Officer at the gangplank. I said, "Good morning," to the First Officer, stepped between them, stood a minute on the top platform, and I thought the Captain was coming, which he was, and I started down the gangplank and the Captain was behind me.

Q. Now, Mr. Marshall, I will show you this sketch that has been marked Plaintiffs' Exhibit 1

(Testimony of Harry L. Marshall.)

for identification. I think I used it on my opening statement.

Mr. Erskine: I would like to have it deemed admitted for identification.

The Court: It may be admitted and marked.

(Sketch referred to marked Plaintiffs' Exhibit 1 for identification.)

Mr. Erskine: I think that Mr. Gerhardt and I stipulated that the Hardinger—I think it was 417 feet from bow to stern. [22]

Mr. Gerhardt: 441 feet 9 inches.

Mr. Erskine: From the bow to the stern. That is stipulated to, if the Court please.

The Court: It may be so stipulated.

Mr. Gerhardt: And 58 feet in breadth.

Mr. Erskine: And so that the court may know what we are talking about, I have a postcard showing the Hardinger. May I have that marked for identification?

Mr. Gerhardt: Go ahead.

The Court: It may be admitted and marked.

(Postcard marked Plaintiffs' Exhibit 3 for identification.)

Mr. Erskine: If the Court would like to see the picture of the ship——

(Handing document to the court.)

Mr. Erskine: And while I am about it, these were supplied me, these pictures, not by your office but by the people with whom I was in touch at the

(Testimony of Harry L. Marshall.)

beginning of this litigation. We might as well have those in to illustrate what actually took place, if you have no objection.

Mr. Gerhardt: These appear to be photographs taken at the dock, Mr. Erskine, rather than at anchor.

Mr. Erskine: Yes.

Mr. Gerhardt: The gangway is resting on the dock.

Mr. Erskine: Yes. Well, if you would rather not use them it is all right. It makes no difference. Do I take it [23] you would rather not have them used?

Mr. Gerhardt: I don't think we need them. I think your diagram will serve sufficiently for this case.

Q. (By Mr. Erskine): Now, Mr. Marshall, showing you the picture of the steamer——

The Court: This is a freighter, is it?

Mr. Erskine: It is a freighter carrying twelve passengers.

The Court: Proceed.

Q. (By Mr. Erskine): The gangway is shown in that picture, is it not, Mr. Marshall?

A. I would think that shows the gangplank there.

Q. That is the gangway in the middle, that dark streak along the middle of the ship?

A. Yes, I would think so.

Q. And that shows that the gangway, the head

(Testimony of Harry L. Marshall.)

of the gangway, was about in the middle of the ship, does it not? Is that right? A. Yes.

Q. And so on the morning of February 1st at 7:30 you went out, as you have testified, to the head of the gangway, stepped out onto the upper platform of the gangway and went down the steps, is that correct? A. That is correct.

Q. Now, did the Captain follow you down the steps?

A. Yes, he followed me down the steps. [24]

Q. Then what happened?

A. Then he turned around to speak to the First Officer. He went up and spoke to the First Officer and I waited until I saw him coming down again, and then I proceeded down the gangplank and he was behind me.

Q. To the lower platform of the gangway?

A. That is correct.

Q. And when you were at the lower platform of the gangway, about how far out from the ship was the barge shown in Plaintiff's Exhibit 1?

A. I would say it was about a foot and a half out from the ship.

Q. The barge was under the lower platform of the gangway, but about a foot and a half out from the side of the vessel? A. That is right.

Q. At that time did you notice whether or not there was a swell in the sea?

A. Well, there was always a swell when you were lying out at anchor, and I noticed that there was a swell that day, yes.

(Testimony of Harry L. Marshall.)

Q. About how high was that swell from the crest of the wave down to the—not a breaking wave but the wave constituting the swell, from the crest down to its hollow?

A. Well, as I recall it, it was between two and three feet, I think. [25]

Q. Was the barge moving with that swell?

A. Yes.

Q. Was the barge loaded or unloaded?

A. It was unloaded. It was empty.

Q. When you were at the lower platform of the gangway that swell was in the sea and the barge was moving up and down with the swell?

A. Yes, sir.

Q. Now, about what distance from the deck of the barge was the lower platform of the gangway?

A. Would you say that again, please?

Q. About what distance, how much above the deck of the barge was the lower platform of the gangway?

A. When I was standing there?

Q. Yes.

A. I would say two or three feet.

Q. And there was this movement of the barge?

A. That's correct.

Q. Now, at that time. Mr. Marshall, did the Captain say anything to you?

A. He said nothing.

Q. And did the First Officer say anything to you?

A. He said nothing.

Q. Was any step taken to lower the gangway so that it was nearer the deck of the barge? [26]

A. None.

(Testimony of Harry L. Marshall.)

Q. Now, you stood there on the lower platform of the gangplank in the position you have described, and what did you do then?

A. Well, I looked at the barge, and sort of subconsciously I wondered if the Captain was going to say anything. Nothing was said, so I assumed I was to jump, and I jumped and he jumped after me.

Q. Now, when you jumped, in what direction did you jump? Parallel to the ship or at right angles to the ship?

A. I had to jump at right angles to the ship because there wasn't enough space to jump straight off the gangplank, because the barge was a foot and a half out.

Q. So you jumped at right angles to the ship?

A. I jumped at right angles to the ship.

Q. And about where on the deck of the barge did you land on that jump?

A. I landed, I would say, six or eight inches, maybe a foot, from the coaming rail of that first hold.

Q. Would you mind coming down here and marking—put an “A” on the deck of the barge at which you now recall you landed, the approximate location? Here is a pen.

(Witness went to blackboard.)

Mr. Erskine: Make it large enough for the Judge to see it. [27]

The Witness: Do you want an “X”?

(Testimony of Harry L. Marshall.)

Mr. Gerhardt: I would suggest for the record that you mark it "M-1."

Mr. Erskine: Yes, mark it "M-1."

The Witness: (Marking on diagram.)

(The witness resumed the witness stand.)

Q. (By Mr. Erskine): When you made that jump and lit on the deck, what happened then?

A. Well, the instant I hit the deck I was pitched forward head down into the empty hold.

Q. You were pitched to your left?

A. Pitched to my left.

Q. By the movement of the barge?

A. That is correct.

Q. And what did you do then?

A. Well, I knew if I went down the hold I couldn't survive it, and I couldn't move my feet because the thing happened so fast, so I twisted my whole body to the right and in that way tore the ligaments out of my left leg.

My right leg, you see, my weight wasn't on the right leg so that was saved, but the left leg took the brunt and I tore the ligaments out of that leg.

Q. Did you know at that time you had torn the ligaments?

A. Oh, no, but I knew I had hurt myself. Then I fell to the deck. [28]

Q. On your hands and knees? A. Yes.

Q. And then did you get up?

A. I got up immediately.

(Testimony of Harry L. Marshall.)

Q. At the time you made that twist of your body to the left did you feel any pain?

A. I felt a dull pain, and I rubbed my knee, but the acute pain came later when the blood got collected there.

Q. Now, when you got up, you got up instantly after you had fallen? A. Yes.

Q. At that time was the Captain of the ship on the barge?

A. As I recall, he was directly behind me.

Q. He jumped directly behind you?

A. Right behind me.

Q. By the way, the deck of the barge was of what material? A. It was heavy steel.

Q. Was it wet or dry?

A. I can't recall. It was an overcast day. I imagine there was a certain amount of sea moisture, but it wasn't wet like a rainy deck.

Q. Now, when you picked yourself up and started across, what did you do then after you picked yourself up?

A. I limped over to the little launch that was at the corner there of the barge. [29]

Q. Would you mind indicating on this sketch here where that little launch was? Mark it "M-2."

(Witness went to the blackboard and marked the diagram.)

Q. (By Mr. Erskine): That little launch was a shore boat, is that correct?

A. That is correct.

(Testimony of Harry L. Marshall.)

Q. And where was that shore boat when you were on the lower platform of the gangway or going down the gangway, do you recall?

A. It was either just ready to tie up there or it was tied up, but it was so close I can't remember whether it was tied up or just tying up.

Q. And you walked from where you had fallen over to the shore boat? A. That is correct.

Q. You had a conversation with the Captain while you were on the deck of the barge immediately after you had fallen?

A. I don't recall whether I had the conversation on the deck or in the little shore boat. I can't recall which place I had it. I can't recall that.

Q. Well, regardless of where you had it, what was said?

A. The Captain said, "Have you hurt yourself badly?" And I said, "I don't know." He said, "Would you like to go back aboard the ship?" And I said, "No, there is no use going back aboard ship because there is no doctor there, and [30] no doctor in Corral, so I think we might as well go on to Valdivia," and he acquiesce, and so we did.

Q. As a matter of fact, there wasn't any doctor on the ship, was there?

A. No doctor on the ship, no doctor in Corral.

Q. After you had gotten into the small boat with the Captain, then what happened?

A. It was, as I recall, about a quarter of a mile in to shore to the dock where you got off and got on the ferry boat that went up the river. We went

(Testimony of Harry L. Marshall.)

from there—limpingly I got off the little boat and onto the bigger boat and we took off for Valdivia.

Q. Valdivia was about how far up the river?

A. Well, by the length of time—we made so many stops it seemed longer than it was, but I understand it is eight or nine miles up the river.

Q. Did the Captain help you from the shore boat to the dock at Corral, and from the dock onto the river boat, or did you make that yourself?

A. I made it myself.

Q. And you went up to Valdivia, did you?

A. We went up to Valdivia together.

Q. What happened to your knee, if anything, while you were going to Valdivia?

A. Well, it kept getting bigger and bigger and bigger, and [31] as I pulled my trousers up it was about the size of a large cauliflower. So when I got to Valdivia I couldn't walk and they helped me off the boat and got me in an automobile and took me to the hospital.

Q. Did you have any medical attention there?

A. Yes, I had two doctors there, one doctor whom the agent had brought, I believe, and then a surgeon who X-rayed me, fluoroscoped me, took the blood off my knee and put my leg in a cast.

Q. Then when you say he took the blood off your knee, what do you mean by that, Mr. Marshall?

A. He put a needle into my knee and drew off a great deal of blood.

Q. Is that what they call "aspirated"?

A. Yes, aspirated.

(Testimony of Harry L. Marshall.)

Q. Then after they put the cast on your knee, what happened then?

A. Then they had an ambulance, and they took me in the ambulance to the hotel with the Captain and the agent, and we had our lunch, and I was in the cast; and then they got an automobile and took me down to the dock and we got back into the river boat.

Q. You were helped back into the river boat?

A. Oh, yes, then I had to be helped a great deal, of course, because of the cast. [32]

Q. Then you went down the river again and got into the shore boat, did you?

A. That is correct.

Q. And you went back to the steamer in the shore boat?

A. That is correct. And the barge was no longer by the gangplank. The gangplank was right there and the officers and some of the crew helped me get aboard. I think they carried me aboard because I couldn't walk up the gangplank.

Q. And you were taken to your cabin?

A. That is correct.

Q. And went to bed then, did you? A. Yes.

Q. Now, I think I may have asked you this, but I am not sure; when you made that jump from the lower platform of the gangway to the deck of the barge, the Captain, you testified, was a few steps up the gangway behind you? A. Yes.

Q. Was there anybody from the ship down on

(Testimony of Harry L. Marshall.)

the barge to help you from the lower platform of the gangway to the deck of the barge? A. No.

Q. When did the steamer leave Corral?

A. Two days after my accident. February 3rd, I believe.

Q. And what did the steamer do then? What course did it take? [33]

A. That was the last port of call on the west coast, so we went through the Straits of Magellan and came up the east side and stopped where they didn't expect to stop, and it wasn't listed, at Bahia Blanco, which was in Argentina, and we stayed there four days.

Q. During the time the steamer was going from Corral to Bahia Blanco were you able to go about the deck at all?

A. The Captain got out some crutches that they had in the storeroom, and with the help of the crutches and passengers, I could get out on deck and sit in a chair and watch the Straits of Magellan.

Q. Did you spend most of your time on deck or in bed?

A. At first I spent most of the time in bed, but after I got the crutches, I tried to go out and sit for an hour or so for air.

Q. Was your knee giving you any pain during that time?

A. It was giving me a great deal of pain. I had to take a great deal of codein which was given me by a trained nurse who was a passenger, and I took

(Testimony of Harry L. Marshall.)

penicillin shots every night to keep from having infection due to the cast.

Q. And that was going on during the time——

A. Went on all the way to Buenos Aires.

Q. Did a doctor come aboard at Bahia Blanco?

A. Unexpectedly a doctor came aboard because some of the passengers, when they went ashore, they got one to come aboard. [34] He came aboard and he said that the cast should come off because the knee was so swollen, so the First Officer and this trained nurse with a great deal of effort got the cast off. The doctor didn't take it off. He went back ashore. The First Officer and the nurse took the cast off.

Q. Then you went on to Buenos Aires?

A. That is correct.

Q. Well, according to this list that has been introduced in evidence you arrived in Buenos Aires, February 16th?

A. That is correct.

Q. What happened then, Mr. Marshall?

A. Well, the Wells Fargo Bank, when I left here they had given me a letter of introduction to the First National Bank of Boston, which has a very large office in Buenos Aires. When I was in Corral I wrote them a letter and asked them to get me the best orthopedic man possible, and make arrangements for him to see me, which they did do, and they gave me the name of the doctor, and the hospital, which was the British—I forget if it was Argentine-British or just the British Hospital. Anyway, I had all that before we left Bahia Blanco, the name of the doctor and the hospital and his residence, and as

(Testimony of Harry L. Marshall.)

soon as I got there the arrangements were made for me to go to the hospital.

Q. And you went to the hospital?

A. That is correct. [35]

Q. And you saw the doctor there?

A. Saw the orthopedic man.

Q. Did you consult with him with respect to your knee?

A. Yes, and he x-rayed me and fluoroscoped my knee, took the blood off again, and said I would have to have surgery, that I would have to be operated on, that the cast wouldn't do any good, that nothing would do any good but surgery. He wanted to operate right then and there.

Q. What did you do?

A. I said well, I would like to fly back to San Francisco and go to Dr. King, whom I knew and who is head orthopedic man at Stanford.

Q. And did you go back from Buenos Aires?

A. I flew back, yes.

Q. You left the ship at Buenos Aires?

A. Yes.

Q. And you flew back from Buenos Aires to San Francisco? A. That is correct.

Q. About when did you arrive in San Francisco?

A. I believe the 1st of March. 2:00 o'clock in the morning, I remember.

Q. Now, before I go on with that, Mr. Marshall, I want to ask you these questions:

I think you have already testified that at these other ports of call that preceded the date upon

(Testimony of Harry L. Marshall.)

which you arrived [36] in Corral, Chile, you and the other passengers would go ashore, is that correct?

A. Yes, once or twice a day sometimes.

Q. You went ashore for what purpose?

A. Sightseeing.

Q. And did the ship make arrangements for you to go ashore? A. Always.

Q. That is, when the ship wasn't tied up to a pier but was anchored out in the harbor at one of these ports of call, the ship would make arrangements for a shore boat to come out to the vessel to take the passengers ashore, is that correct? A. Yes.

Q. And do you recall whether or not on any other occasion prior to this occasion at Corral you had gone ashore by getting on a barge and then from the barge getting onto a shore boat?

A. I can't recall that definitely because the barges were nearly always kept away from the gangplank.

Q. So your best recollection is that on all prior occasions you went ashore in a shore boat into which you got directly from the gangplank, is that correct?

A. Yes, I think that's right.

Q. Now, what was the practice on those prior occasions so far as the passengers were concerned in moving from the gangway onto the shore boat that took them ashore?

A. Well, the shore boat would come up, and either by one of [37] those poles and a hook, hooked onto the gangplank, and there would be a man who was running the shore boat would come aft, if we

(Testimony of Harry L. Marshall.)

were getting on the aft, and there would always be a seaman or a Second or Third Officer on the lower platform to help us on the boat, and the man on the boat would help us into the boat.

Q. And how near the top of the gunwale of the shore boat would the lower platform of the gangway be on those occasions?

A. Well, that would vary with the type of weather we were having, and that would be a little hard to say, but when we needed—I can remember sometimes it would be enough so that you needed a lot of help. The man in the little boat would grab the passenger and put them into the boat after the man on the gangplank would let you go out.

Q. Then there was a man from the ship on the platform of the gangway that would help the passengers go from the gangway to the shore boat and the man in the shore boat would help, is that right?

A. Yes.

Q. On those occasions, would you use whatever help was offered you? A. Yes.

The Court: We will now take a recess.

(Short recess.)

Q. (By Mr. Erskine): Mr. Marshall, in looking over my notes [38] I find I may have overlooked one or two points. This sketch shows correctly the barge and the ship, and the relationship of the barge to the ship and the relationship of the barge to the gangplank, doesn't it? A. Yes.

Q. In other words, there were three holds on the barge? A. That is correct.

(Testimony of Harry L. Marshall.)

Q. And the lower platform of the gangplank was about opposite what has been marked on the sketch as the forward end of the barge?

A. That is correct.

Q. And that is in the position shown in the sketch? A. I think that's right.

Q. Now, Mr. Marshall, just another couple of questions, a couple of other loose ends. How old are you now? A. Sixty-three.

Q. And on February 1st, 1955, you were——

A. Sixty-one.

Q. Sixty-one. Was the Captain of this ship, the Hardinger, did he know how old you were on February 1st, 1955?

A. Yes, because he celebrated my birthday with me ashore.

Q. During the course of this voyage?

A. Yes.

Q. Before you arrived at Corral?

A. Oh, yes. Ten days before. [39]

Q. And now, I don't know whether you have testified to this or not, but when you got to Corral—I mean when you got to Bahia Blanco and the cast was removed, was your knee swollen?

A. Yes.

Q. Filled with blood again? A. Yes.

Q. Was the blood taken off?

A. You see, the cast was taken off after the doctor had gone ashore. There wasn't anybody to take the blood off, so it wasn't taken off.

(Testimony of Harry L. Marshall.)

Q. But after Buenos Aires was your knee swollen again with blood?

A. It was the same swelling, only a little larger.

Q. I see. Was the blood taken off there?

A. Immediately.

Q. How long did you stay in Buenos Aires before you got a plane home?

A. Well, we got there the 16th and I stayed and I got here the 1st of March, so I was there fourteen days. The reason for that was that my airplane reservation—one reason for that was that my reservations were cancelled by the company for some bigger brass and I had to wait another seven or eight days to get another reservation.

Q. Was the blood taken off your knee more than once while you were in Buenos Aires? [40]

A. I believe twice.

Q. Aspirated in the way you have described?

A. Yes.

Q. I think you have testified that during the trip from Corral to Bahia Blanco were you or were you not suffering pain from your knee during that trip?

A. Well, when the blood would collect like that there was a throbbing pain and a nasty pain.

Q. That painful condition continued at Buenos Aires? A. Yes.

Q. And it continued until you got to San Francisco? A. That is correct.

Q. What did you do when you got to San Francisco?

A. Well, I telegraphed, I believe, from Buenos Aires for an appointment with Dr. King, so every-

(Testimony of Harry L. Marshall.)

thing was arranged on arrival. After staying a night at a hotel I went immediately to Stanford. That was the 1st of March, I believe.

Q. Were you admitted to the hospital at that time?

A. Yes. Dr. King examined me in his office, took the blood off again, had lots of X-rays and fluoroscopes, and ordered me a room and to get ready for surgery.

Q. And you were operated on on March 7th?

A. I can't remember that date. Was it the 7th?

Q. Well, it was a few days after you arrived in San Francisco? A. Yes. [41]

Q. And you arrived here on March 1st, is that correct? A. Yes.

Q. Now, after that operation, Mr. Marshall, was there any change in the condition of your knee so far as pain is concerned?

A. Well, it was a different kind of pain. As soon as the surgery and they sewed all the ligaments together, then there was no more collection of blood so I had no more of that type of swelling, but I had the pain from the surgery and the bandages and the dressings, and so forth.

Q. Now, how long after—strike that. When did you begin to take physiotherapy?

A. As soon as the doctor let me out of the hospital. About two weeks after surgery.

Q. About two weeks after surgery?

A. Yes.

Q. You began to take physiotherapy?

(Testimony of Harry L. Marshall.)

A. Yes.

Q. What did that consist of, Mr. Marshall?

A. Well, heat lamps to start with, and he asked me to have heat lamp treatments at home so I had to rent one and I took that morning and night, and gradually they put weights on my foot, strapped them on, and then I would work that up and down, and they increased the weights until I got to—I can't remember, but it was a goodly number of pounds before I [42] was discharged. I would have to lift it up like that (demonstrating).

Q. When were you discharged?

A. I think it is in the record there, but I think about the 27th of April, I believe. It is in the bills there.

Q. The 27th of April, 1955? A. Yes.

Q. And that is when you were discharged from physio-therapy treatments? A. Yes.

Q. After the operation did you have any post-operative pain?

A. None except what I just said, the pain from the surgery. But after the physiotherapy it was painful, of course, lifting weights, but when I wasn't lifting weights, I didn't have much pain, no.

Q. When did the doctor discharge you?

A. Oh, I went back, I believe, to see him, well, for a year. I mean two or three times, just to be checked up.

Q. Yes. Do you suffer any pain now of any consequence from this injury to your left knee?

A. No pain. It is a barometer for weather. I

(Testimony of Harry L. Marshall.)

can tell when it is going to rain, but I have no pain. It is sore to the touch.

Q. Can you use that knee as you did before?

A. Yes, I use my knee all right. [43]

Mr. Erskine: I think that is all. Oh, pardon me. I want to offer these special damages.

If the Court please, I have a list of the bills that Mr. Marshall paid because of this injury to his knee. I had the cancelled checks and the bills and everything listed here. I went over the list with Mr. Gerhardt this morning and he said, as I recall our conversation, that he would stipulate that the items stated in the list are correct.

Mr. Gerhardt: That is correct, your Honor. I have checked all the cancelled checks and the bills and the totals agree with the totals that are on this list, so rather than introduce all those checks and receipts, I think it would be quite satisfactory to admit the list into evidence.

Mr. Erskine: Then I offer the list in evidence.

The Court: Let it be admitted and marked.

(List referred to admitted into evidence as Plaintiff's Exhibit 4.)

Mr. Erskine: The list shows that Mr. Marshall paid \$543.68 to Stanford Hospital; \$25.00 to Doctor Clark; \$200.00 to Doctor King; \$98.00 to Nurse McKinney; \$28.00 to Nurse Fisher; to Stanford Hospital for the physiotherapy, \$165.75; for rent of the lamp \$30.00; transportation charges \$38.00; total of \$1,218.43.

(Testimony of Harry L. Marshall.)

Q. (By Mr. Erskine): I show you this list, Mr. Marshall, and that list, Plaintiff's Exhibit 4, is a correct statement of [44] the amount expended by you for doctors, nurses, hospital, physiotherapy because of this injury to your knee?

A. Yes, with the exception that I never listed my South American expenses because I paid by Travelers Checks and I have no record of it.

Q. The expenses you paid down in Valdivia, Bahia Blanco, and Buenos Aires, doctor and medical expenses you paid down there, are not included here?

A. No.

Q. You paid those by Travelers Checks?

A. Yes.

Q. You didn't have bills?

A. Well, I didn't keep them anyway.

Q. Can you estimate about how much those expenses came to?

A. Well, you know, the rate of exchange was in our favor, I believe, and I wouldn't say I spent altogether in Valdivia, Bahia Blanco and Buenos Aires—and I went every day for treatment by taxi—I don't think the whole thing would total more than \$100 or \$125.

Q. I believe you said this trip was taken as a pleasure trip for a vacation?

A. That is correct.

Mr. Erskine: That is all.

(Testimony of Harry L. Marshall.)

Cross-Examination

By Mr. Gerhardt:

Q. Mr. Marshall, I show you Westfall-Larson Company contract passengers ticket No. 0045 providing for the first part of your passage from Los Angeles to Buenos Aires aboard the Hardinger, which contains on the reverse side a signature "Harry L. Marshall, Jr." I will ask you if that is your signature?

A. Yes, that is my signature.

Q. And is that the contract passengers ticket that was issued to you before you boarded the vessel?

A. Yes, I would think so.

Mr. Gerhardt: I will ask that that be admitted as Respondent's first in order.

The Court: It may be admitted and marked.

(Passengers ticket admitted into evidence as Respondent's Exhibit A.)

Q. (By Mr. Gerhardt): Mr. Marshall you arranged for your ticket aboard the vessel in San Francisco, is that correct?

A. That is correct, sir.

Q. And you paid, I think, according to the ticket, \$750.00 for the first leg of your passage, together with an additional baggage charge of \$5.00, or \$755.00, is that correct?

A. Well, it is my recollection I paid for a round trip.

(Testimony of Harry L. Marshall.)

Q. Yes. I am just talking about the first half of the voyage. The round trip would be double that or approximately \$1,460.00?

A. Yes, but I paid that here before we left. [46]

Q. Yes. And about how long before you left did you pick up your ticket?

A. Well, I can't recall that, but I would say a week or two weeks before. I don't know.

Q. Then as I understand it, you boarded the vessel in Los Angeles and you completed the voyage at least as far as Buenos Aires, the first half?

A. That is correct.

Q. Was the passage money for the second half of your trip refunded to you?

A. Not at the time, but later on.

Q. Later on?

A. It had to go through the office machinery. I got it maybe six weeks later.

Q. And that was refunded in an amount of approximately \$750.00 or \$755.00, is that correct?

A. That is correct.

Q. Now, in connection with your going ashore when the vessel was at anchor in other ports, about how many times had you done that before this trip ashore at Corral, Chile?

A. Well, you mean in those little boats?

Q. In the small boats, yes.

A. Well, whenever we didn't dock, and I would say—may I look at that list?

Q. You certainly may. [47]

A. Oh, I have a copy of it here. You see, there

(Testimony of Harry L. Marshall.)

were so very few places we could go up to dock. In Buena Ventura we did both. At low tide they would have to cast the ropes off and go back into the main stream. So that would be one on the little boats. Well, I would say maybe seven out of nine that we were out in midstream.

Q. Were those occasions when quite a few passengers went ashore—more than one?

A. Oh, we nearly always went together. There were anywhere from six to eight. Some parties of two might stay aboard.

Q. But normally some six or eight passengers went ashore on those occasions?

A. I would think so.

Q. Did that include women passengers?

A. Yes.

Q. And these small boats were shore tugs that came out and picked you up from the foot of the gangway? About what size were those as compared with the barge you boarded at Corral, Chile, to go ashore?

A. Well, they varied in every port, but this one, as I recall, was a rather small one. Now, that barge was a hundred feet long, I believe, and I would think that this little tug would be about twenty, twenty-five feet.

Q. Was that about the average size, twenty or twenty-five feet, thirty feet? [48]

A. I would say they varied. Some of them were quite big and some were twenty, twenty-five feet. I think this was as small as any.

(Testimony of Harry L. Marshall.)

Q. Well, would you say that any of them exceeded fifty feet? A. No, none that I recall.

Q. They wouldn't exceed fifty feet?

A. No, I don't think so.

Q. And those smaller tugs or shore boats that came out to pick you up, did they have considerably more movement in the water then, for instance, this large barge had alongside the vessel?

A. Well, I think definitely. The law of gravity, I would say yes.

Q. And compared to the movement of the smaller boat that you had previously boarded from the platform at the bottom of the gangway, the barge on this occasion was a much more stable structure so far as movement was concerned?

A. It depended a good deal on the weather and the size of the tug.

Q. Taking the smaller tug and waves or swells, rather, from two or three feet high, there was considerably more movement of the tug under those circumstances than there was of the barge, isn't that right?

A. Oh, yes, that would be true. Just like if the barge was [49] loaded, there would be less movement than if it was empty.

Q. On this particular occasion, your testimony this morning was that there was some moisture but that the deck was not wet. What do you mean by that, Mr. Marshall?

A. I say it was not wet from rain. I said it was an overcast day and early in the morning there

(Testimony of Harry L. Marshall.)

must have been some night sea moisture on deck. It would look wet but it wouldn't have any retention of water like rain on it.

Q. Are you guessing at that or do you recall?

A. Well, I am not guessing. I know it's true.

Q. When your deposition was taken, Mr. Marshall, you remember being present in my office at the time your testimony was taken on June 29, 1956?

A. Yes.

Q. On page 19 where I was inquiring of you concerning the condition of the deck of the barge, I asked you if it was a steel deck and you said that it was. One of my questions was, "Was it dry?" Your answer was, "It was. I would say dry, yes. It hadn't been raining. It was dry."

A. That is what I had in mind. It wasn't a rainy day. Just the sea moisture which certainly had no thickness to it.

Mr. Erskine: No what?

A. It had no depth like raindrops. It was just the moisture you get at sea.

Q. (By Mr. Gerhardt): Did you slip on that deck? [50]

A. I did not slip.

Q. Now, when you came down the gangway that morning to board the barge, did you expect there would be somebody there to help you off the gangway?

A. Well, I came down the gangplank with the Captain, and I assumed that what we did would be with the approval of the Captain. If there wasn't

(Testimony of Harry L. Marshall.)

anybody on the barge, I assumed he didn't want anybody on the barge.

Q. This was a little different situation than had existed before, I mean in the sense that just you were the only passenger going ashore with the Captain, is that right?

A. Well, yes, but there had been times when just one passenger went.

Q. That is contrary to your testimony awhile ago. I understood you to say that at least six or eight passengers would go.

A. I said that was usual, but I can remember when one or two people went.

Q. This was different, though, in the sense that there was this large one hundred foot barge located at the foot of the gangway, is that correct?

A. That is correct.

Q. And as I recall, at the time your deposition was taken, on page 22 you stated that you did not think there would be anybody down on the barge to assist you, isn't that right? [51]

Mr. Erskine: Wait a second. What page is that? I think you should show him the testimony.

Mr. Gerhardt: I will read it to him.

Mr. Erskine: And let him take a look at it.

Mr. Gerhardt: All right. On page 21, line 25, Mr. Marshall, I asked you, "Now, did you expect there would be somebody at the end of the lower platform to assist you onto the barge?" And your answer was, "That had always been customarily so. I mean on and off the ship there was always some-

(Testimony of Harry L. Marshall.)

body to help you when we went ashore, but I thought because of the earliness of the morning that one would have to accept the prevailing situation. There wasn't anybody there, and I thought because it was half past seven in the morning that they had failed to put somebody there."

Is that right? Was that your answer?

A. Right.

Q. How far away was the Captain from you when you jumped?

A. I would say two to three steps up the gangplank.

Q. Two to three steps? Did you inquire of him or make any statement to him how you were expected to get off onto the barge?

A. No. I tarried a few seconds on the lower platform. The Captain was two or three steps behind me and no orders were given.

Q. You say there was nobody on the barge? [52]

A. I saw nobody on the barge.

Q. There was no obstruction? You could see the complete deck of the barge, couldn't you, Mr. Marshall?

A. I certainly could.

Q. And as you were coming down the gangway you were naturally facing in a direction which would take in practically the entire length of the barge on the side nearest to the vessel, is that correct?

A. Not necessarily. I think when you are going down a gangplank you look at your feet, and when

(Testimony of Harry L. Marshall.)

you get to the platform, if you are going to jump at right angles, you look at right angles.

Q. Had there been somebody working in there in this area within twelve to fifteen feet of the bottom of the platform, do you think you would have seen them?

A. If I were looking that way I would certainly have seen them, yes.

Q. As you walk down a gangplank do you watch your feet every second? A. I certainly do.

Q. And when you got to the bottom of the platform didn't you look at the entire barge to see what its movement was?

A. No, I was looking at the holds and I was looking back to see if the Captain was coming, and I decided the only way I could get on the barge would be to jump at right angles [53] because if I jumped ahead of me the passage was too narrow.

Q. And you saw no one there?

A. I saw no one there.

Q. Did you have any conversation with anyone on the barge?

A. I had no conversation with anybody on the barge because I saw no one.

Q. Did anybody on the barge speak to you?

A. No one that I heard.

Q. Did anyone on the barge give you a warning not to jump?

A. If they had, I wouldn't have jumped. I would have asked the Captain.

(Testimony of Harry L. Marshall.)

Q. Had that warning been given, you would have waited?

A. I would have asked the Captain then.

Q. Without that warning, was there any reason for you to go ahead and jump without asking the Captain?

A. Oh, I don't think a passenger need ask a Captain or order a Captain. I think when he was two steps behind me if he didn't want me to jump he would have said so, or he would have said, "Let me go ahead."

Q. Now, could you have jumped from the corner of the lower platform of the gangway along this edge of the barge, that is the inboard edge?

A. No. No, because it was too dangerous, because the barge was out about a foot and a half and if I had jumped there the passageway was too narrow. [54]

Q. Could you have jumped towards forward hold?

A. No, not knowingly, no.

Q. Mr. Marshall, do you know how you were pitched when you hit? What was it that pitched you?

A. I think the swell of the sea. I think the barge must have been coming up.

Q. The barge was coming up?

A. I say I think it was coming up.

Q. Then as I recall your deposition testimony, you said there was no movement of the barge away from or toward the vessel, that is, a sideways motion?

(Testimony of Harry L. Marshall.)

A. All I recall is that the barge was up and down, a swell movement.

Q. Yes. And there was no fore and aft movement, that is, toward the bow of the vessel or towards the stern of the vessel?

A. Not that I could testify to.

Q. Your recollection is that the barge was moving in an up and down manner? A. Yes.

Q. Can you recall when you jumped whether the barge was on the way up on the swell or whether it was on the way down?

A. Well, that would be hard to recall exactly, but I think it was up—coming up.

Q. Coming up? And do you recall whether it had reached the [55] peak of the swell?

A. No.

Q. It had not?

A. I do not recall that.

Q. What made you decide that that was the proper moment to jump?

A. Well, I had stood there a few seconds and it seemed to me it was a safe distance. What I didn't understand or know is what a swell could do to you.

Q. And in this particular instance——

A. (Interposing): If there had been no swell, it would have been a safe jump.

Q. That is true, but you could see the swell, couldn't you? A. Right.

Q. Now, when you jumped at right angles from the lower platform, you jumped so that you would

(Testimony of Harry L. Marshall.)

land on your feet in this area between the forward end of the barge and the forward hold?

A. Which was a ten foot space, I believe.

Q. Now, did you land with your feet on the deck of the barge facing across the barge?

A. Approximately. I was right angles to the ship, but perhaps a little to the left. What that was due to, I don't know. Then as soon as I hit the barge, I was pitched headlong down into the hold.

Q. You didn't actually go into the hold? You stopped yourself before you went into the hold?

A. I wouldn't be here if I hadn't.

Q. What I am trying to get at, Mr. Marshall, is that when you jumped off the gangway platform, was there anything while you were going through the air that made you land at an angle so that you were facing toward the hold?

A. If there was, I can't account for it, outside of the swells.

Q. But you hadn't contacted the barge at that time when you were on your way through the air, had you?

A. But I didn't really get turned till I hit the barge, and then I got the impact of the barge when it was coming up and that turned me. Whether the barge at the same time was going backward or forward, I don't know. That is what happened, though.

Q. Did your feet land solidly on the deck?

A. Landed solidly. So solidly that I couldn't move them when I got pitched. It all happened so fast, I couldn't move, I just had to twist.

(Testimony of Harry L. Marshall.)

Q. Was this pitch of your body sideways or was it in the direction you had been jumping?

A. It was sideways about, I would say, four-fifths, and a little forward into it, too. The whole thing was like that (demonstrating). [57]

Q. So that when you landed, then, as I understand it, and assuming this area inside the jury box is the hold and this railing is the coaming, when you landed then you landed so that you were at an angle somewhat facing toward the hold?

A. That's correct.

Q. Even though when you jumped from the platform you had jumped so that you would land facing across the barge?

A. That's my recollection, yes.

Q. And you don't know of anything that made you twist in midair?

A. Unless the barge moved forward or backward, but I cannot account for it because I did not see it.

Q. Well, if the barge moved forward or backward, that still wouldn't affect your body as it was traveling through the air, before you landed?

A. My body wasn't affected until I hit the deck.

Q. Did you land on both feet at the same time?

A. Landed on both feet at the same time, but more weight seemed to be on the left foot and that is why I couldn't lift it or move it.

Q. Did you actually strike the edge of the coaming with your leg or your feet? A. No.

Q. Or with any part of your body?

(Testimony of Harry L. Marshall.)

A. No part of my body struck the coaming. [58]

Q. As you landed in this position, you turned in which direction—to your right? A. Right.

Q. Which would be toward the forward end of the hold—forward end of the barge?

A. That's correct.

Q. Did you twist your right knee at that time?

A. No, my weight was on my left when I hit the deck and I twisted my left knee by turning it. My right knee had no ill effects whatsoever.

Q. Now, Mr. Marshall, will you tell me about the conversation you had with the Captain after you returned to the vessel in which the matter of fault was discussed?

A. Well, you have that all in my deposition. When we came back to the ship and I was in bed in my cabin, the Captain came by to see me, as he did often after that, and I felt he was worrying a great deal about it, and I didn't know how badly hurt I was, and we had about ten days to go through the Straits, and I said, "Don't worry. Don't give it a thought. I feel it was my fault."

Q. And did you make that statement to him more than once?

A. I don't think so, but if I did I will certainly stand behind it.

Q. Did you make the same statement to the Chief Officer? A. Yes, I did. [59]

Q. And along about the same lines as this conversation with the Captain?

(Testimony of Harry L. Marshall.)

A. Yes, I said I didn't want him to worry, that I thought it was my fault.

Q. Did you at the same time make any reference to the fact that you weren't quite as young as you thought you were, or any other comment about the circumstances?

A. Oh, yes, I could have very likely said that, and I am willing to say that I did say it.

Q. Mr. Marshall, about when did you have any conversation with the Captain? How long after the accident?

A. Oh, I think, as I recall, it was the night I came back from Valdivia and I was in the cast in my cabin.

Q. When was it that you made a similar statement to the Chief Officer?

A. I don't know for sure, but I would think either that night or the next morning.

Q. Now, Mr. Marshall, we have taken some depositions in this case and one of them was by a seaman who testified. His name was Norffin and he testified in his deposition about the circumstances existing on that day. Did you read his deposition?

A. Yes, I did.

Q. And in that deposition he stated that you were given a warning not to jump. Do you disagree with that statement? [60]

Mr. Erskine: Now, just a second, if the Court please. I object to the form of the question. It is argumentative. He can't quote the testimony of another witness and ask this witness if he agrees with

(Testimony of Harry L. Marshall.)

it or not. He has stated very clearly and unequivocally that he didn't see anybody on the barge, didn't hear anybody say anything to him from the barge.

The Court: Reframe your question. The objection will be sustained.

Mr. Gerhardt: Did you read the testimony of Mr. Kaldefoss? A. Yes, I did.

Q. And you examined the diagram that he made of the vessel and the barge alongside, is that right?

A. Yes, I did.

Q. And as I recall it, you felt that his diagram was correct except that he placed the barge a little further forward under the gangway?

Mr. Erskine: Just a second. I object to that question, if the Court please. If he wants to impeach the witness in some way, let him read the testimony. Don't ask him what he thought about the testimony of another witness.

Q. (By Mr. Gerhardt): Mr. Marshall, let me call your attention to page 11 of your deposition, line 9:

"Mr. Marshall, I show you Defendant's Exhibit A for identification, which is attached as an exhibit to the deposition of Alfred Kaldefoss, whom [61] you may remember was a Chief Officer on that vessel. A. Right.

"Q. Have you seen that diagram before?

"A. Mr. Erskine showed it to me just a short time ago this morning.

"Q. I see. Now, does that represent the situa-

(Testimony of Harry L. Marshall.)

tion that existed at the time you went down the gangway?

“A. It does partially. As I say, facing the bow the gangplank was on the left, and it was coming down toward the stern.

“Q. Yes.

“A. But this barge at the time was——

“Q. You are referring to the barge in the diagram?

“A. Yes. It was nowhere this close to the ship.

“Q. How far away would you say it was?

“A. Well, I would say that it was about a foot and a half this way (indicating) from the ship.

“Q. The barge, the side of the barge nearest the vessel was a foot and a half away from the side of the Hardinger? A. That's right.

“Q. Now, go ahead, please.

“A. And as I remember, the barge was not under the gangplank to that extent. It was more toward [62] the stern of the ship so that this deck was out a foot and a half from the Hardinger and this passageway here (indicating) was about even with the platform of the gangplank.”

Mr. Erskine: That is corrected, Mr. Gerhardt, to say that it was opposite the platform of the gangplank.

Mr. Gerhardt: Oh, I am sorry; my deposition doesn't so indicate.

Mr. Erskine: I should have called that to your attention. It is “opposite the platform of the gangway.”

(Testimony of Harry L. Marshall.)

Q. (By Mr. Gerhardt): That was your testimony in answer to those questions at that time, is that right, Mr. Marshall? A. Yes.

Q. That distance between the side of the barge and the side of the vessel you have estimated at about a foot and a half. Could that have been a little bit more or a little bit less?

A. Well, you know it is rather hard to be accurate. Even the captain and the first officer weren't accurate in their depositions.

Q. You were all quite close, between a foot and a foot and a half, is that correct?

A. Yes, I believe so. I gave you my best recollection.

Mr. Gerhardt: That is all.

(Witness excused.) [63]

The Court: Take an adjournment until 2:00 o'clock.

(Thereupon this cause was adjourned until the hour of 2:00 o'clock p.m.) [63-A]

February 18, 1957—2:00 P.M.

Mr. Erskine: If the Court please, I have no further examination of Mr. Marshall. We have Dr. King who took care of Mr. Marshall. Dr. King had operations scheduled for the afternoon and he said he couldn't interrupt his schedule and asked me to do what I could to avoid that occurring. I asked Mr. Gerhardt about it, and Mr. Gerhardt said he

had no objection to going ahead with his case, and we can call the doctor tomorrow morning, if that is satisfactory with the Court.

The Court: Very well. [64]

Mr. Gerhardt: If your Honor please, opening respondent's case I should like to call Mr. Nelson. Mr. Nelson speaks only fair English, your Honor, and I think he could get along without an interpreter, but for any words we might have difficulty with I have asked Mr. Berge, of San Francisco, to attend.

JAN ARTHUR NELSON

was called as a witness on behalf of the respondent, and after being first duly sworn, testified as follows:

The Court: Your full name, please?

A. Jan Arthur Nelson.

Q. What is your business or occupation?

A. I work on shore.

The Interpreter: He says he works——

The Court: Oh, we will get along all right.

Q. Where do you work?

A. I don't know what you call it in English.

Mr. Erskine: Can you speak a little louder, please, Mr. Nelson?

Mr. Gerhardt: Speak a little louder, please.

The Witness: Well, I work in the house where we got some sacks and things.

The Court: Where were you born?

A. In Bergen.

Q. Bergen what? A. In Norway. [65]

Mr. Erskine: Will you read that last answer?

(Testimony of Jan Arthur Nelson.)

(Answer read by the reporter.)

The Court: Maybe we had better use the interpreter. It might be better.

The Interpreter: He is at the present time working in a warehouse in Bergen, Norway.

Direct Examination

By Mr. Gerhardt:

Q. What is your age, Mr. Nelson?

A. Twenty-four.

Q. Were you employed on the vessel named the Hardanger on February 1, 1955? A. Yes.

Q. What was your position or capacity as a seaman aboard at that time?

A. Ordinary seaman.

Q. Ordinary seaman? And did you witness an accident to a passenger, Mr. Marshall, who is here in court, who was leaving the vessel while it was at Corral, Chile, in February, 1955? A. Yes.

Q. Now, Mr. Nelson, let me show you an exhibit. Can you see all right from where you are?

A. Yes.

Q. This is an exhibit, Plaintiff's Exhibit 1, which has been filed and which is an air view, or bird's-eye view looking down on the deck of the Hardanger. [66] A. Yes.

Q. And which shows a barge located alongside the after end of the Hardanger, and at the forward end of the barge shows a gangway which leads

(Testimony of Jan Arthur Nelson.)

from the main deck of the Hardanger down to a position over the deck of the barge.

Now, at the time of the accident where were you?

A. I was standing down there and painting.

Q. Will you come down here and——

Mr. Erskine: I didn't get that answer.

The Interpreter: "I was standing down there and painting."

Q. (By Mr. Gerhardt): With reference to the gangway and the barge, where were you standing?

A. I was standing here, painting (indicating).

The Court: The reporter can't hear you.

Q. (By Mr. Gerhardt): The reporter can't get that, Mr. Nelson, but——

(Addressing the Court): The man placed his finger between the after end and——

Mr. Erskine: No, no, no. I didn't understand him to place his finger there at all. He showed it alongside there.

Mr. Gerhardt: That is what I am getting to. He started off at the after end of the forward hold. He didn't touch that. He moved his finger——

Mr. Erskine: I think, if the Court please, that the witness should be permitted to point out where he was, without [67] further statement from counsel.

Mr. Gerhardt: All right, I won't make any further statement.

Q. Let me let you use a pen and mark there your initials, "J.N.," where you were when Mr. Marshall came down the gangway. Just mark on the

(Testimony of Jan Arthur Nelson.)

diagram where you were when he came down the gangway.

A. (Witness marks on Plaintiff's Exhibit No. 1.)

Q. Now you may resume the witness chair, Mr. Nelson.

A. (Witness resumes witness chair.)

Q. What were you doing, what kind of work were you performing at the time?

A. I was scraping and painting.

Q. Scraping and painting what?

A. The ship.

Q. The side of the Hardanger?

A. The side of the Hardanger.

Q. Was there anybody else on the barge with you? A. Yes.

Q. Who was that?

A. Well, I can't remember the name. It was Norfolk, or Norhouse.

Q. Another seaman? A. Another yeoman.

Q. What is a yeoman? [68]

A. The first thing is a deck man, and then yeoman, and ordinary sailor.

Q. As I understand it, a seaman who first takes a position on the vessel is called a deck boy?

A. Yes.

Q. Then he is advanced to yeoman, then ordinary seaman? A. Yes.

Q. And this other man that was on the barge with you was a yeoman? A. Yes.

(Testimony of Jan Arthur Nelson.)

Q. Now, what was the condition of the sea at this time?

Mr. Gerhardt: Would you repeat that, Mr. Berge?

(Question reiterated by the interpreter.)

A. (Through the interpreter): There was a little swell, as we call it—a little slight movement of the sea.

Q. (By Mr. Gerhardt): Now, Mr. Nelson, will you tell us what you saw and what you did at the time Mr. Marshall came down the gangway?

A. Well, when I saw Mr. Marshall come down the gangway I tell him not to jump. I call up, "Don't jump."

Q. Where was he when you said that to him?

A. He was down on the platform.

Q. On the lower platform of the gangway?

A. Yes.

Q. Go ahead. [69]

A. And he didn't answer me, and just jumped, and when he landed on the deck he was falling, but I couldn't see how he came down on the deck. I just saw he was falling over. And after that was somebody coming down and helped him up, but who it was I cannot really remember.

Mr. Erskine: Just a second.

I would like to have you read that answer, please.

(Answer read by the reporter.)

Q. (By Mr. Gerhardt): Why did you tell him not to jump?

(Testimony of Jan Arthur Nelson.)

Mr. Erskine: Just a second.

That calls for a conclusion of the witness. I don't think it is his state of mind that is important; it is what he said and what he did.

The Court: Objection will be sustained.

Q. (By Mr. Gerhardt): Did you notice whether Mr. Marshall was looking in your direction when you warned him?

A. Well, he must see us. We stand right on the same way.

Mr. Erskine: I will ask that that answer go out as being unresponsive, and a statement of the conclusion of the witness, if your Honor please.

The Court: You may read the question and answer, please, Mr. Reporter.

(Record read by the reporter.)

The Court: Objection overruled. Question and answer may stand. [70]

Q. (By Mr. Gerhardt): Now, Mr. Nelson, how was the barge fastened to the side of the Hardanger?

A. With a rope aft and forward.

Q. A rope, or line, aft?

A. Aft, and one forward.

Q. Leading from where? From the barge to the Hardanger?

A. From the barge to the Hardanger.

Mr. Gerhardt: That is all.

You may cross-examine.

(Testimony of Jan Arthur Nelson.)

Cross-Examination

By Mr. Erskine:

Q. Mr. Nelson, when did you leave the Hardanger?

A. When did I leave? You mean paid off?

Mr. Erskine: Will you translate that to him, please?

(Question reiterated by the interpreter.)

A. September, 1956.

Q. (By Mr. Erskine): And what have you been doing since you left the Hardanger?

A. Since I left the Hardanger I go back home to Norway, and stay home for a few months, and after that I went on board another ship with the name Astria.

Q. And after that, what?

The Court: He boarded another ship.

Q. (By Mr. Erskine): And you said you were working at the present time in a warehouse? [71]

A. Yes. And after was staying on the Astria eight months. I paid off and stay ashore.

Q. You are working ashore now? A. Yes.

Q. In a warehouse? A. Yes.

Q. In Bergen? A. In Bergen, yes.

Q. What sort of a warehouse is that?

A. Well, an ordinary one.

Q. An ordinary warehouse? A. Yes.

Q. Are you dealing with any people speaking English while you are working in that warehouse?

A. No; just Norwegian.

(Testimony of Jan Arthur Nelson.)

Q. Now, Mr. Nelson, did you ever study English in school? A. No.

Q. Did you ever live in an English-speaking country?

A. I have been in London six weeks.

Q. When was that?

A. It was in '51—1951 and 1952.

Q. Have you ever used English—prior to February 1, 1955, did you ever use English in connection with your business or socially with your friends and family when you were talking with them? [72]

A. Well, I talk English—well. I lived in the Norwegian Seamen's Center in London. When you went out in town you had to speak English to be understood.

Q. That was in London?

A. That was in London, yes.

Q. I think you said, Mr. Nelson, that the barge was tied to the ship with two lines. A. Yes.

Q. One that is marked on the sketch here as "Forward"? A. Yes.

Q. And one from the after end? A. Yes.

Q. Would you mind coming down here and showing us where, on the aft end of the barge, the rope was tied that made the barge fast to the ship?

A. (Stepping to diagram): Well, as I remember, there was one rope here, and up here (indicating).

Q. Would it be correct for me to say that the rope on the aft part was—the rope was on the

(Testimony of Jan Arthur Nelson.)

barge at the point I am now marking "X"—and I am putting your initials opposite the "X"?

Mr. Gerhardt: Would you mind using a "1" after that, because I already have something marked "J.N."

Mr. Erskine: "J.N.-1."

Q. Is that about where the rope was tied fast to the barge? [73]

A. I don't really remember, but there was a rope on each side, but it is usually in the middle of the barge.

Q. It is usually in the middle of the barge?

A. Yes.

Q. About where I put the "X"? A. Yes.

Q. And that rope ran to what place on the ship, about? A. Oh, here (indicating).

Q. Would you mind if I marked it with an "X" up here, and marked it "J.N.-2"? That would be about the place where the rope was made fast to the ship? A. Yes.

Q. You can sit down again, Mr. Nelson.

(Witness resumes witness chair.)

Q. Now, when did you first see Mr. Marshall? Did you see him for the first time at the top of the gangway or on the lower platform of the gangway?

A. I saw him when he went down the gangway.

Q. You saw him coming down the gangway?

A. Yes.

Q. It is a fact, is it not, Mr. Nelson, that you saw

(Testimony of Jan Arthur Nelson.)

the captain and the first officer standing at the head of the gangway?

A. I didn't saw the captain. I was just looking at Mr. Marshall. [74]

Q. Did you see the captain coming down the stairs of the gangway, or on the gangway, at the time you spoke to Mr. Marshall?

A. I just see Mr. Marshall down there.

Q. Now, in your testimony you said that there was another man involved, but said you didn't remember who it was. Is that a correct statement of your testimony?

A. No, I didn't say that. I said there was somebody was helping him up again, but I can't remember who it was.

Q. You didn't recognize the captain?

A. No, I didn't.

Q. Would you say it wasn't the captain?

A. I can't say anything, because I didn't see anything but Mr. Marshall when he started to jump there.

Q. I want to find out this, Mr. Nelson: Would you say that the man who was helping Mr. Marshall up was not the captain?

A. I can't remember who it was.

Q. You can't recall who it was? That's your answer? A. That is my answer, yes.

Q. But you do recall that Mr. Marshall hit the deck and then fell over, is that right?

A. Fell over, yes. When he was falling, was

(Testimony of Jan Arthur Nelson.)

somebody else coming up and helping him, but I can't remember who it was.

Q. But you do recall when Mr. Marshall hit the deck of the barge on his jump he did fall over, didn't he? [75] A. Yes.

Q. You saw him fall?

A. I saw him fall, landing on the deck; I can't remember.

Mr. Erskine: Will you read that answer, Mr. Reporter, please?

(Answer read by the reporter.)

Q. (By Mr. Erskine): And did he pick himself up immediately after he fell?

A. Somebody was helping him.

Q. Somebody was helping him?

A. But who it was I can't remember.

Q. Now, you saw the individual helping him, didn't you? A. Pardon me?

Q. You saw the person who was helping Mr. Marshall rise to his feet?

A. I saw there was somebody, but who it was I can't remember. Sorry.

Q. You knew the captain of the ship quite well?

A. I knew him fairly well.

Q. Fairly well. But you didn't recognize that the captain was the man who was lifting Mr. Marshall to his feet?

A. There was some other ones there, too, but who it was——

Q. You don't know who it was? A. No.

(Testimony of Jan Arthur Nelson.)

Q. Now, did you see that other man jump from the lower [76] platform of the gangway onto the barge? A. No.

Q. You didn't see that?

A. I didn't see that because, you see, when Mr. Marshall fell I was running forward to help him, but before I came to Mr. Marshall there was somebody else who helped him up. Maybe some of the crew of the barge, or someone else: I can't remember who it was.

Q. You think it was some member of the crew of the barge helped Mr. Marshall up?

A. I think so.

Q. Is that right?

A. I think so. I can't remember.

Q. Do you know, Mr. Nelson, whether or not there was anybody on the barge prior to the time that Mr. Marshall jumped—just prior to the time that Mr. Marshall jumped, beside you and Nordfonn? A. What is that?

Mr. Erskine (To Interpreter): Will you ask the question, please?

(Question reiterated by the interpreter.)

A. Well, those people who was on the barge was those people who was working on there, and the tug—you know, the tug that we was going ashore with was laying out there.

Mr. Erskine: I didn't quite get that answer. [77]

(Answer read by the reporter.)

(Testimony of Jan Arthur Nelson.)

Q. (By Mr. Erskine): Is it your testimony, Mr. Nelson, that—I will reframe that question.

Is it your testimony that at the time Mr. Marshall jumped there were other men on the barge besides you and Nordfonn?

A. Not besides. He was working along there.

Mr. Erskine: I didn't get the answer.

(Answer read by the reporter.)

Mr. Erskine: I didn't get an answer to my question.

I think I will ask you to translate this question, and I would like the reply translated so I will understand it. The question will be this:

Is it your testimony, Mr. Nelson, that at the time Mr. Marshall jumped there were other men on the barge besides you and Nordfonn?

A. (Through the Interpreter): At the time of the accident there was no one working or just at the ramp there besides me and Nordfonn, but there must be some people working at the barge, and I can't say whether they were the people that came and helped Mr. Marshall up or if that was some people coming down the gangway. I can't recollect that.

Mr. Erskine: I would like to get an answer, a clear answer, to this question. You put it to him, if you please:

Q. Is it your testimony that when Mr. Marshall jumped there were other men on the barge besides you and Nordfonn? [78]

(Testimony of Jan Arthur Nelson.)

Mr. Gerhardt: I submit that has been asked and answered.

Mr. Erskine: I haven't got a clear answer to it. Translate that to him, please.

(Question reiterated by the interpreter.)

The Interpreter: He says that when the accident happened some people were coming there and helping, but he is not able to recollect if those people came from the barge, itself, or if they came from the ship. He says in the little excitement there, he says it is very difficult for him to remember where those people came from, but some people came and helped Mr. Marshall up.

Mr. Erskine: But he does not know whether those people came from the ship or came from the barge, is that right?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he cannot remember.

Q. (By Mr. Erskine): Was there more than one person who came to help Mr. Marshall, or was there only one person who came to help Mr. Marshall?

(Question reiterated by the interpreter.)

The Interpreter: He says he is not able to answer that question. There was somebody helping him, but if there was one person or if there was more he cannot recall.

Q. (By Mr. Erskine): And you can't state whether or not that person was the captain of the ship? [79]

(Testimony of Jan Arthur Nelson.)

A. (By the Witness, in English): No.

Q. You cannot recollect?

A. I cannot recollect.

Q. Now, just to make sure, when you saw Mr. Marshall on the lower platform of the gangway, did you see anybody else on the gangway behind Mr. Marshall?

A. I just see Mr. Marshall when he jumped and went down the gangway, down to the platform, and then I yelled, "Don't jump," but he just jumped.

Mr. Erskine: I ask that the answer go out, if the Court please, as non-responsive to my question. I would like to have the question reread, and I would like to have it translated to the witness so that I will be sure of what the answer is.

The Court: Read the question, Mr. Reporter.

(Question read by the reporter.)

The Court: Translate that to him, and translate his answer into English.

(Question reiterated to the witness by the interpreter.)

A. (Through the Interpreter): I didn't see anybody behind Mr. Marshall when he came down the gangway.

Q. (By Mr. Erskine): Did you see anybody at the top of the gangplank, on the top platform of the gangway, at the time you saw Mr. Marshall jump?

A. I just looked for Mr. Marshall, that's all I do, but [80] where the other people come——

(Testimony of Jan Arthur Nelson.)

Mr. Erskine: I ask that the answer go out, if the Court please, as being non-responsive.

Mr. Gerhardt: I submit it is responsive, your Honor. He is explaining what he look at.

Mr. Erskine: I want to find out from him whether or not he saw anybody on the top platform of the gangway at the time Mr. Marshall jumped.

The Interpreter: Shall I translate?

Mr. Erskine: Yes.

(Question put to the witness by the interpreter.)

The Interpreter: He didn't notice that.

Q. (By Mr. Erskine): Didn't notice anybody?

Now, before you saw Mr. Marshall jump you were scraping and painting the ship, were you?

A. Yes.

Q. And was Nordfonn doing the same thing?

A. Yes, sir.

Q. Where was Nordfonn on the barge at the time you saw Mr. Marshall jump? A. Beside me.

Q. Within a yard?

The Witness: What?

(Question reiterated by the interpreter.)

A. (In English): Could be a meter, or half a meter, or [81] something.

Mr. Erskine: It would be stipulated, I suppose, counsel, that a meter is $39\frac{1}{2}$ inches? I looked it up.

Mr. Gerhardt: So stipulated.

Q. (By Mr. Erskine): Now, I would like to

(Testimony of Jan Arthur Nelson.)

have you come down here, Mr. Nelson, and show me where Mr. Nordfonn was alongside of you at the time you saw Mr. Marshall jump. Just take my pen and put your own initials there and mark it "J.N.-3," where Mr. Marshall was.

A. (Stepping to diagram and marking): I was here and Mr. Nordfonn was beside me.

Q. To your right or your left as you faced the ship? A. To my right.

Q. To your right? A. Yes.

Q. All right. Just put down where he was. About a meter away, you said?

A. About a meter, or half a meter.

Q. Now, just resume the witness stand.

(Witness resumes witness chair.)

Q. And both you and Nordfonn were scraping on the ship at the time you saw Mr. Marshall jump, is that right? A. Yes.

Q. How far out from the ship was the barge at that time?

A. Why, it would be a foot, one and a half feet, or something. [82]

Q. Ordinarily when you scrape and paint on a ship, you scrape and paint from a sling, don't you, on the side of the ship?

(Question reiterated by the interpreter.)

The Interpreter: He says that usually they do it, but when the ship was down there, when they had

(Testimony of Jan Arthur Nelson.)

these barges working alongside, they use these barges as a platform to work from.

Q. (By Mr. Erskine): Now, do you remember—do you recall, Mr. Nelson, that shortly after Mr. Marshall jumped, and when he was picking himself up from the deck of the barge, that the captain shouted to you or Nordfonn to stop pulling on the line that was tied to the after part of the barge and that tied the barge to the ship?

A. (Through the Interpreter): I can't remember that.

Q. Isn't it a fact, Mr. Nelson, that shortly after Mr. Marshall jumped from the lower platform of the gangway onto the deck of the barge the captain shouted to you to stop pulling on the rope that tied the after part of that barge to the ship?

Mr. Gerhardt: I submit, your Honor, the witness has stated he does not remember.

Mr. Erskine: Well, I am asking him.

Mr. Gerhardt: It has been asked and answered.

Q. (By Mr. Erskine): What is the [83] answer? A. I can't remember, I say.

Q. Will you say that that didn't happen?

A. I can't remember.

Q. Will you say that at the time Mr. Marshall jumped onto the barge and when he was picking himself up the captain shouted to somebody on that barge to stop pulling on the rope that tied the after part of the barge to the ship?

(Colloquy between the interpreter and the witness in the Norwegian language.)

(Testimony of Jan Arthur Nelson.)

A. (By the Witness, in English): I can't remember the captain saying that to us.

Q. (By Mr. Erskine): Well, let's leave the captain out of it for a minute, then. Do you recall whether or not anybody, at the time Mr. Marshall jumped onto the barge, shouted to you and Nordfonn, either of you or both of you, to stop pulling on that rope? A. I can't remember.

Q. Will you say that it didn't happen; that that shout was not made?

A. I can't say anything because I don't remember.

Q. Just to make absolutely sure of your testimony, isn't it a fact that after Mr. Marshall had jumped onto the barge, and when he fell and was picking himself up, that someone connected with the ship shouted at someone on the barge not to pull on the rope at the after end of the barge, the rope that tied [84] the after end of the barge to the ship?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he can't remember. He is not able to remember.

Q. (By Mr. Erskine): You do recall, though, Mr. Nelson, that at that time after Mr. Marshall had made his jump you weren't pulling on the rope?

(Colloquy between the interpreter and the witness in the Norwegian language.)

The Interpreter: He says he cannot remember doing that.

(Testimony of Jan Arthur Nelson.)

Mr. Erskine: He can't recall whether or not he was pulling on the rope at the time Mr. Marshall was picking himself up?

The Interpreter: Yes.

Mr. Erskine: He says he cannot recall that?

The Interpreter: He cannot recall that.

Q. (By Mr. Erskine): As I understand your testimony, then, Mr. Nelson, nobody from the ship spoke to you in any way about the rope or about anything else at the time you saw Mr. Marshall coming down the gangway or on the lower platform of the gangway and when he was on the deck? Nobody spoke to you from the deck?

A. No; I say I can't remember nobody.

Q. Nobody? Do you remember when you were first asked, Mr. [85] Nelson, where you were when Mr. Marshall jumped, you drew your finger, or pencil, along this part of the deck of the barge (indicating)—that is, along the deck of the barge opposite the middle hold on the barge? Do you remember doing that?

A. You see, we were looking from this way. At the time Mr. Marshall was standing down on the platform I was——

Mr. Erskine: I didn't hear that.

A. (Continuing): At the time Mr. Marshall was standing down on the platform, I stand right there where he got me to (indicating on diagram).

Mr. Erskine: I ask that the answer go out as being nonresponsive to my question.

(Testimony of Jan Arthur Nelson.)

The Court: It may go out. Have him go down there and point it out.

Q. (By Mr. Erskine): Come down here, Mr. Nelson.

(Witness steps to diagram.)

Q. What I asked, Mr. Nelson, is this: When you first started to testify this afternoon and you were asked where you were on the barge when Mr. Marshall jumped, you drew your finger along that part of the deck of the barge that is opposite the center hold.

A. Yes, when Mr. Marshall went down on the platform I was standing right here (indicating).

Q. Yes. You recall that quite well, do you? You remember that very well? [86]

A. What?

Q. You remember where you were on the barge at the time Mr. Marshall jumped very well, don't you?

A. I stay here.

Q. Do you recall that well?

A. Yes.

Q. You can go back to the stand.

(Witness resumes witness chair.)

Q. You recall that fact very well, Mr. Nelson, but you don't recall who the man was who helped Mr. Marshall to his feet, do you?

(Witness shakes head in a negative manner.)

Q. You don't? You have to answer.

A. No.

Q. When did you arrive here from Bergen?

A. Saturday afternoon.

(Testimony of Jan Arthur Nelson.)

The Court: When?

The Witness: Saturday.

The Interpreter: Saturday afternoon, he says.

Q. (By Mr. Erskine): Did you talk to Mr. Gerhardt after you arrived here? A. Yes.

Q. Did he show you at that time a sketch of the deck of the barge and the gangway?

A. Yes. [87]

Q. And did he ask you at that time to point out to him where you were on the barge at the time Mr. Marshall jumped?

A. He tell me to tell the truth.

Mr. Erskine: I ask that the answer go out.

The Court: What was the answer?

Mr. Erskine: He said Mr. Gerhardt told him to tell the truth.

Q. What I asked you, Mr. Nelson, was whether or not at the time you talked with Mr. Gerhardt, and at the time you had this sketch before you and him, he asked you to point out to him where you were on the barge at the time Mr. Marshall jumped? Did he? A. Yes.

Q. What is the answer? A. Yes.

Q. At that time you pointed out to Mr. Gerhardt approximately the same place on the barge that you pointed out to us this afternoon, is that right?

A. Yes.

Mr. Erskine: I think that is all, your Honor.

The Court: Any questions?

Mr. Gerhardt: I have no questions, your Honor.

The Court: How old are you?

(Testimony of Jan Arthur Nelson.)

A. Twenty-four, sir.

Q. Twenty-four? How long have you been going to sea?

A. Nearly five years.

Q. You have been in this country before?

A. I have been in San Francisco before, yes, with the Hardanger.

Q. Would you sooner live here than in Norway?

A. It is better to live here, yes.

Q. Why don't you stay?

A. I got my work back home, and my wife and child.

Q. Why don't you bring them over?

A. Costs money.

Q. How much money do you make on the ship?

A. It is better to live on shore when you are married.

Q. Where are you working?

A. In a warehouse in Bergen.

Q. What is your salary there a week?

A. About 200 kroner. That makes about \$30.00 a week.

Mr. Erskine: I would like to ask one more question—just one more.

The Court: Under the circumstances I will allow it.

Q. (By Mr. Erskine): Did you read Mr. Nordfonn's deposition before you testified?

A. No, I didn't.

Mr. Erskine: That is all.

The Court: Step down.

(Witness excused.) [89]

Mr. Gerhardt: If your Honor please, my next witness will be through the deposition of Alfred Kaldefoss, and I should like to read that testimony.

This is a deposition, if your Honor please, taken in my office on June 18, 1956, pursuant to the usual stipulations. The direct examination was by myself, and we proceeded as follows:

(Thereupon, the deposition of Alfred Kaldefoss was read into the record.)

Mr. Gerhardt: I will ask that that deposition, your Honor, be introduced in evidence.

The Court: It may be marked.

(Deposition of Alfred Kaldefoss admitted into evidence as Defendant's Exhibit B.)

Mr. Gerhardt: Then I should like to read the deposition of Bjarne Sellevald. This is a deposition also taken by stipulation on June 18, 1956, and at that time the questions on direct examination by myself are as follows:

(Thereupon, the deposition of Bjarne Sellevald was read into evidence.)

Mr. Gerhardt: I will ask that this be introduced as our exhibit next in order.

The Court: It may be admitted and marked.

(Deposition of Bjarne Sellevald admitted into evidence as Defendant's Exhibit C.) [90]

Mr. Gerhardt: We have just one more deposition which we can read the first thing in the morning.

The Court: Take an adjournment to 10:00 o'clock tomorrow morning.

(Thereupon, this cause was adjourned to Tuesday, February 19, 1957, at the hour of 10:00 o'clock a.m.) [90-A]

Tuesday, February 19, 1957—10:00 A.M.

The Clerk: Marshall vs. Westfal-Larsen Company, further trial.

Mr. Erskine: If your Honor please, I have arrived at an arrangement with Mr. Gerhardt before the trial with respect to one of the allegations of the complaint, and Mr. Gerhardt agreed to stipulate to it and I neglected to mention it.

I would like to have the record show that it is stipulated between Mr. Gerhardt and one that the transportation of the plaintiff on this steamer Hardinger by the Westfal-Larsen Company was conducted by that company as a regular, scheduled transportation as a common carrier for hire.

Mr. Gerhardt: So stipulated. And if your Honor please, before we proceed, in checking the record I note that my Exhibit B, which was the deposition of Kaldefoss and which has been introduced in evidence, contains a diagram which is attached to the deposition and which I would like to offer as a separate exhibit next in order.

The Court: It may be admitted and marked.

(Diagram in Defendant's Exhibit B admitted into evidence as Defendant's Exhibit D.)

Mr. Erskine: As I said yesterday, your Honor, our doctor, Dr. King, could not come yesterday so with the Court's permission and counsel's permission, I will put him on now. [91]

Dr. King, will you take the stand, please?

DR. DON KING

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

The Clerk: State your name for the record, please.

The Witness: Dr. Don King.

Direct Examination

By Mr. Erskine:

Q. You are an orthopedic surgeon, Doctor?

A. Yes.

Q. Do you live in San Francisco?

A. Yes, sir.

Q. And as I said, you are an orthopedic surgeon?

A. Yes.

Q. You are with the Stanford Hospital?

A. Yes.

Q. Are you a professor with the hospital?

A. Yes, I am a professor in orthopedic surgery there at the Medical School.

Q. How long have you been in that position, Doctor?

Mr. Gerhardt: I will stipulate to the doctor's qualifications, your Honor.

The Witness: Oh, about 20 years.

(Testimony of Dr. Don King.)

Q. (By Mr. Erskine): About 20 years?

A. Yes.

Q. Now, Doctor, did you see the plaintiff in this case, Mr. [92] Harry L. Marshall, around March 3rd of 1955? A. Yes.

Q. And did you examine his left knee at that time? A. Yes.

Q. Will you describe to the Court the condition of the knee as disclosed by your examination at that time?

A. Yes. Mr. Marshall was complaining of pain in the knee, and he was having a good deal of trouble walking on it because of paining and his inability to straighten the knee out. It was bent up under him so that he couldn't straighten it out. When I examined his knee, I found that it was swollen——

Q. It was what?

A. It was swollen and very tender to pressure around the joint, and he was unable to straighten the knee out.

Q. I think you doctors describe that as saying that the knee was in a flexed position?

A. Yes.

Q. And was locked in that position?

A. Yes.

Q. That is, he couldn't straighten it out?

A. That is right.

Q. Was there any blood in the knee?

A. Yes. Well, first I took some X-rays and the

(Testimony of Dr. Don King.)

X-rays did not show anything in the way of a broken bone, so then I took a needle and I aspirated the knee and I got out about an ounce, [93] 30 c.c.'s of bloody fluid, from the joint.

Q. Was that serous fluid?

A. No, it was a bloody fluid.

Q. I beg your pardon? A. A bloody fluid.

Q. Now, at that time did you arrive at some diagnosis as to what was wrong with the knee?

A. Yes; we thought he probably had a torn cartilage in the knee, and so we entered him into the hospital and on March 7th of 1955, I operated upon the knee.

I found that the cartilage, although it was quite loose, was not actually locking the knee, but that he did have a torn ligament called the Cruciate ligament in the knee, and I think that was really the cause of the locking more than the cartilage.

Q. That was the anterior cruciate ligament?

A. Yes, that is it.

Q. And what was the condition of that ligament?

A. It was torn away from its attachment.

Q. Was it broken?

A. Yes, it was torn in two like you would pull a string in two, you might say.

Q. Just as though a string had been pulled in two, is that right? A. Yes. [94]

Q. The cruciate ligament had been pulled in two?

A. Yes, that's right.

Q. Now, Doctor, I am not familiar with these things, and it may be that the Court doesn't know

(Testimony of Dr. Don King.)

exactly what that ligament is, so I got hold of a medical book and I would like to mark a page of this book for identification, with the understanding that I can take a photostat of that page and substitute the photostat for the page of the book, if there is no objection.

Mr. Gerhardt: I have no objection, your Honor.

Mr. Erskine: I wonder if you would mark that page for identification?

(Page marked Libelant's Exhibit 5 for identification.)

Mr. Gerhardt: For the record, that is a page of what book, Mr. Erskine?

Mr. Erskine: It is page 242 of a German book.

The Court: Of a what?

Mr. Erskine: Of a German book.

The Court: Well, what's the matter with our own books?

Mr. Erskine: Well, I don't know. This was given to me, your Honor. I suppose it would have been better to get a book in English.

The Court: Well, we have one here in the library. We will have no trouble on that score.

Mr. Erskine: "Handatlas Der Anatomie Des Menschen."

Mr. Gerhardt: It is written in German, too. Do you [95] understand that?

Mr. Erskine: Can't read a word of it. Some of it is written in Latin. I can make out a little bit of it.

(Testimony of Dr. Don King.)

The Court: I am not altogether sure that you are not trying to confuse me.

(Laughter.)

Q. (By Mr. Erskine): Well, Doctor, showing you Plaintiff's Exhibit 5, is that a correct representation of the knee joint? A. Yes.

Q. It is more than life size, though, is that right?

A. This is more than life size?

Q. Yes. A. Oh, no.

Q. Would you point out in that picture, and mark with a pencil, if you don't mind, the ligament that you say was broken like a string might be broken?

A. It is this one right here. That is labeled "Ligamentum Cruciatum Anteriorus"—the anterior cruciate ligament. That's the one that was broken, just about across there.

Q. Mark that——

A. (Interposing): I will put a circle around it.

Q. Will you mark that a little more distinctly where it was broken?

The Court: It doesn't show in the X-ray at all?

The Witness: The ligament is soft tissue, so that doesn't [96] show in the X-ray, no.

Q. (By Mr. Erskine): Now, Doctor, I think you said that the operation disclosed that ligament, the anterior cruciate ligament, had been broken across as a string is broken. Now, what else—did you find anything else as a result of the operation?

(Testimony of Dr. Don King.)

What else did the operation disclose in respect to the condition of the knee?

A. The anterior horn, or the front part of that cartilage, is a little loose; but the chief pathology, the chief trouble, I think was that torn ligament, as I remember it.

Q. And what did you do to repair the damage, Doctor?

A. Well, we just stitched it together there where it was torn.

Q. Did you find any blood fluid in the knee when you operated?

A. Yes, there was a little extra bloody fluid in the knee when we operated on it, although I had removed most of it with the needle before, two or three days before.

Q. But you found some blood there when you operated?

A. Yes.

Q. That wasn't normal blood in that locality, but it leaked into the locality?

A. Yes.

Q. In other words, the knee was constantly seeping a little blood, is that correct?

A. Well, I guess you would say that, or it was just a bloody fluid which was still there from the original injury. I don't [97] know that it would be constantly seeping at that late date after the injury.

Q. Well, the fact is that from time to time blood had been aspirated from the knee.

A. Yes. Oh, from his knee?

Q. Yes.

A. I don't know. I only aspirated it once and I

(Testimony of Dr. Don King.)

can't remember whether the doctors down in South America aspirated it or not. I don't remember that point.

Q. If we assume that from time to time blood had been aspirated from his knee on prior occasions and it had again accumulated, would it be your opinion that blood was seeping constantly from the wound into the knee?

A. I don't think so. I think that the—You see, the knee is like the lining of the mouth. There is a membrane lining the knee joint and it keeps on secreting fluid, and I think that the blood that was in the knee probably accumulated there just within, say, a week after the accident, but it kept on secreting this fluid, which would remain bloody for months afterward. A little bit of blood in the knee joint will remain there for a long, long time and will color any fluid which subsequently is secreted by the lining membrane.

Q. I see. What ordinarily happens to that fluid? Is it carried off through the system?

A. Slowly, over a period of perhaps three or four months it [98] generally absorbs, yes.

Q. But the thing I don't understand, Doctor, is this: From time to time Marshall's knee was—there was an accumulation of some sort of fluid in the knee that looked like blood that was aspirated.

A. Yes.

Q. That doesn't take place in the normal knee, does it? A. No.

Q. Why would it take place in his knee?

(Testimony of Dr. Don King.)

A. Well, because of the injury.

Q. Because of the injury?

A. Because of the trauma, the injury, which irritated the knee, tore the cruciate ligament, and here this ligament was flopping about in the knee and continually irritating the synovial membrane, this membrane that lines the capsule of the joint.

And any time the synovial membrane is irritated, it will secrete extra fluid. It is Nature's way of. I suppose, protecting the joint and keeping the individual from moving it too much. It fills it up with fluid.

Q. It was the irritation of the membrane that caused the accumulation of fluid? A. Yes.

Q. Now, have you testified as to what you did to repair the damage?

A. I think I said that I stitched the ligament together. [99]

Q. And that was the essence of it?

A. That was the essential or basic principle of the operation. We stitched the cartilage down snugly, but repairing the cruciate ligament, I believe, was the essential thing which had to be done in this case.

Q. You stitched the ligament together?

A. Yes.

Q. And that was the main part of the operation?

A. Yes.

Q. Now, I suppose that when that was accomplished and when the cartilage was taken care of in the way you have described, you sewed the wound up and that was the end of the operation?

(Testimony of Dr. Don King.)

A. Yes, sir.

Q. Now, what treatment did he have after the operation, Doctor?

A. Well, after the operation, of course, we applied a bandage, a snug, thick compression bandage, for a time, until the soft tissues were healed, and then we gave him what is called physiotherapy or physical therapy in an effort to restore movement to the joint, restore power to the musculature of the thigh. and so on, exercises, and so on.

Q. And what did the physiotherapy consist of?

A. Well, the application of heat, a heat lamp, electric pad, or something of that sort. Possibly a little massage. But more particularly exercises to build up the muscles. [100]

When a knee has been injured and has not been used properly over a period of time, the muscles around the knee shrink. They undergo what is called atrophy. So therefore, once you get the knee joint repaired, it is essential that you start the patient exercising this musculature in order to build it up so that he will have a strong leg to bear his weight upon, and that, I think, is basically what Mr. Marshall had, as I remember it.

Q. He lifted weights with his foot, did he?

A. Weights were fastened to a special shoe that they use. The patient has to lift these weights with the muscles on the front of the thigh in order to strengthen them.

Q. And he went through that physical therapy, did he, Doctor, as you have described?

(Testimony of Dr. Don King.)

A. Yes.

Q. Now, when was the last time that you saw him in the year 1955? Was it October 20th?

A. The last note I have is on October 20, 1955.

Q. And what was the condition of the knee at that time?

A. Well, my note, I think, describes it. I have here, "Comes in for checkup. No complaints. Knee exhibits a full range of motion. Good stability. No swelling, discharged." That's all I have down.

Q. There was some scar tissue left over this wound, I suppose?

A. Oh, yes, there is always a scar where you make an incision. [101]

Q. And I mean in the ligament itself where you sewed it together, I suppose that has scar tissue?

A. Oh, yes.

Mr. Erskine: I think that is all.

Cross-Examination

By Mr. Gerhardt:

Q. Doctor, the note you have referred to during your direct examination, are those your own office notes? A. Yes.

Q. You have used that to refresh your recollection of your treatment and diagnosis?

A. Yes.

Q. Of Mr. Marshall? A. Yes.

Q. May I have a look at those, please?

A. Certainly (handing document to counsel).

(Testimony of Dr. Don King.)

Q. While I am quickly going through these, Doctor, let me ask you this question: Did you find that the knee healed quite rapidly following the operation?

A. Yes.

Q. And is it necessary that the soft tissue should be satisfactorily knitted before you place a patient, like Mr. Marshall was, on any exercise regime?

A. Yes, you don't get very good results unless you wait until the healing process is well established. Otherwise, they [102] have a lot of pain.

Q. I see. And when was it that the exercises regime was started?

A. I am sorry, I can't remember exactly.

Q. Do you have that in your notes?

A. I can look and see whether I have anything like that down or not. Well, I have got. "Continue with physiotherapy" there on 5/5/55. I am afraid I don't have down exactly when we started it. On March 31, which would be about—let's see, when did I say we operated on it—approximately three weeks afterwards, the quadriceps muscle is thin. Oh, here it is.

Q. That would be 3/31. And that would be the date, then, that you felt that the soft tissues had satisfactorily knitted so that you could start the physiotherapy?

A. Yes, somewhere around there.

Q. Doctor, I am looking at some notes which apparently were made in 1947. Was that a leg injury?

A. Yes, he had a mild tear of his gastrocnemius

(Testimony of Dr. Don King.)

muscle. That's the calf muscle. That was in 1947, or whenever it was.

Q. And was that to the right leg or the left leg?

A. Right.

Q. Right leg? A. Yes.

Q. Was there any involvement of the left leg in that case? A. No. [103]

Q. Did you have any other history of any prior injury to the left knee or left leg?

A. No, not that I can recall.

Q. Was there any scar on the left knee from any prior injury, or any evidence of any prior injury?

A. No.

Mr. Gerhardt: That is all.

Mr. Erskine: No further questions.

(Witness excused.)

Mr. Erskine: Well, I am going to ask Mr. Marshall just one or two questions, if the Court please. Shall I do it now?

Mr. Gerhardt: Well, have you finished your case in chief? I would suggest I proceed with the defense, and then if you want to put him on for rebuttal, Mr. Erskine——

Mr. Erskine: Yes.

Mr. Gerhardt: If your Honor please, we have one more deposition of a witness from the vessel. This is Mr. Nordfonn's deposition.

This is the deposition of Kjell Nordfonn, which was taken by stipulation on June 18, 1956. The examination was as follows by myself:

Mr. Erskine: Pardon me. This witness was examined through an interpreter.

Mr. Gerhardt: That is right.

(Thereupon the deposition of Kjell Nordfonn was read into [104] the record and subsequently admitted into evidence as Respondent's Exhibit E.)

Mr. Erskine: Mr. Marshall, please.

The Clerk: Harry L. Marshall to the stand, heretofore sworn.

HARRY L. MARSHALL,

recalled as a witness, being previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Erskine:

Q. Mr. Marshall, you testified yesterday you signed this ticket, Defendant's Exhibit A? That is correct, is it not? A. Yes, sir.

Q. When you signed that ticket, did you read it?

A. I signed for this at the General Steamship Line office and gave them my check, and when they handed it to me, I glanced at it, and then I assumed everything was ethical and I didn't read it; I just signed it.

Q. Now, you glanced at the front of it, did you?

A. Yes, and I turned it over.

Q. You notice there is a lot of fine print on the back of it. Did you try to read the fine print on the back of it at all?

(Testimony of Harry L. Marshall.)

A. No, I just glanced at it and signed it.

Q. Now, Mr. Marshall, I show you a letter here dated May 8, 1955, and signed B-j-a-m-e. I think that's the signature. [105] Whose signature is that on that letter?

Q. That is the signature and the first name of the captain.

Q. Captain Sellevald? A. Yes.

Q. The captain of the Hardinger when you were aboard? A. Yes.

Mr. Erskine: I would like to offer this letter and ask it be admitted into evidence.

Mr. Gerhardt: I object to the introduction of the letter, if Your Honor please, for the following reasons: There is no opportunity to examine the captain in respect to this letter. It bears a date which is in advance of the date when the deposition was taken. If this letter was in the possession of the libelant and his counsel at the time the captain's deposition was taken, use could have and should have been made of it at that time.

The captain is not a party to this action. He was originally named as a party but he was never served.

I therefore submit, if Your Honor please, it is improper to introduce a letter at this time from the captain in view of the fact that there is no opportunity by cross-examination of the captain or direct examination to ascertain the circumstances and the explanation behind the letter.

The Court: Let it be admitted and marked for the purpose of identification. [106]

(Testimony of Harry L. Marshall.)

(Letter referred to marked Libelant's Exhibit 6 for identification.)

Mr. Erskine: I might say that the only reason I am offering the letter at this time is in relation to this admission that Mr. Marshall made to the captain after the accident occurred. That is the main purpose, to rebut the effects of that admission.

The Court: For that limited purpose I will allow it, subject to your motion to strike and over your objection.

(Libelant's Exhibit 6, heretofore marked for identification only, admitted into evidence for the limited purpose indicated.)

Mr. Erskine: May I have the letter, Your Honor? This is addressed, "To My Dear Harry," May 8, 1955.

(Thereupon Libelant's Exhibit 6 was read into the record by Mr. Erskine.)

Mr. Gerhardt: I renew my objection, Your Honor, and move to strike the letter, it being merely an attempted admission of evidence from a person who is not a party and which is not binding upon the respondent in this case.

The Court: Do you wish to argue it?

Mr. Erskine: Well, no, I will submit it.

The Court: I think counsel's legal position is correct. Motion will have to be granted.

(Testimony of Harry L. Marshall.)

(Libelant's Exhibit 6, heretofore admitted for the limited [107] purpose indicated, stricken.)

Mr. Erskine: That is all.

Cross-Examination

By Mr. Gerhardt:

Q. Mr. Marshall, did you ever have a prior injury to your left knee?

A. I think in my deposition I said when I was about 12 years old I skidded on a motorcycle. I had a surface burn and there is a slight scar on the knee from the surface burn.

Q. On the knee?

A. On the knee, which I can show you. I have had it since I was about 14.

Q. If I may, with Mr. Erskine's permission, there was one item of your testimony which you gave yesterday, Mr. Marshall, which I am a little confused about, and that is in respect to the time you first went down the gangway and the captain, as I remember your testimony, started to follow you and then he returned to the top of the gangway.

A. Yes, that's my recollection.

Q. Yes. Now, at that point were you about half way down the gangway?

A. I was about, I would say, between half way and three-quarters of the way down.

Q. And how long did you wait there for the captain?

(Testimony of Harry L. Marshall.)

A. As I recollect, I waited until I saw him start down.

Q. Would that be a minute or two? [108]

A. Well, I can't remember how long he talked to Kaldefoss, but I would say it was a short time, about maybe a minute.

Q. And what did you do during that period of time?

A. I looked up at him and I looked down at the barge.

Q. Now, then, after he started down the gangway for the second time and you went ahead to the lower platform, did you wait on the lower platform any period of time at all while the captain was coming down?

Mr. Erskine: Are you commencing another cross-examination, Mr. Gerhardt? Just a second, Mr. Marshall. Is counsel commencing another cross-examination?

Mr. Gerhardt: No.

The Court: I will give you the same privilege.

The Witness: As I testified before, and also in the deposition, I stood on that lower platform for several seconds, and the captain was coming down, and when he got to the—about three steps of me and didn't say anything and I heard no orders from anybody, I jumped onto the barge.

Mr. Gerhardt: That clarifies the question I had, thank you.

Mr. Erskine: That is all.

(Witness excused.)

Mr. Erskine: No further testimony, Your Honor.

The Court: Matter submitted on both sides, gentlemen?

Mr. Erskine: Well, I would like to argue it.

The Court: On the evidence?

Mr. Gerhardt: Yes.

Mr. Erskine: Yes.

The Court: That is all the testimony? We will take a recess.

(Short recess.)

(Thereupon closing arguments were presented by respective counsel.)

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 110 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed June 20, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk for the United States District Court for the Northern District of Cali-

fornia, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court in the above-entitled case and that they constitute the record on appeal as designated by the attorneys of the appellant;

Complaint to recover for personal injuries.
Answer.

Proposed Amendments to Findings of fact
and Conclusions of law.

Findings of fact and conclusions of law.

Decree.

Reporters Transcript, Feb. 18, 19, 1957.

Exhibits 1 to 6.

Exhibits A to E.

Notice of Appeal.

Order for Transmission of exhibits.

Designation of Record on Appeal.

In witness, whereof, I have hereunto set my hand and affixed the seal of said District Court this 26th day of June, 1957.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15611. United States Court of Appeals for the Ninth Circuit. Harry L. Marshall, Jr., Appellant, vs. Westfal-Larsen & Co., General Steamship Company and Bjarne Sellevold, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 26, 1957.

Docketed: June 28, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

of his damages, but such portion thereof as should be allowed him under the circumstances.

4. The trial court's conclusion of law that libelant is not entitled to recover any damages from respondent is clearly erroneous; the evidence shows without any substantial conflict that libelant is entitled to recover damages from respondent.

ERSKINE, ERSKINE &
TULLEY,

By /s/ MORSE ERSKINE,

/s/ MORSE ERSKINE,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 28, 1957.

No. 15,611

United States Court of Appeals
For the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant,

vs.

WESTFAL-LARSEN & Co., GENERAL STEAM-
SHIP COMPANY and BJARNE SELLEVALD,

Appellees.

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

MORSE ERSKINE,

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FILED

JUN 10 1958

PAUL P. O'BRIEN, CL

No. 15,611

**United States Court of Appeals
For the Ninth Circuit**

HARRY L. MARSHALL, JR.,

Appellant,

vs.

WESTFAL-LARSEN & CO., GENERAL STEAM-
SHIP COMPANY and BJARNE SELLEVALD,

Appellees.

**Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.**

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable Judges of the United States Court
of Appeals for the Ninth Circuit:*

There is a point in this case that both the trial court and this court entirely overlook, a point so clear that he who runs may read; a point to which no answer can be made and which is decisive.

The proposition is this: Respondent, in the performance of its obligation to exercise the highest degree of care to protect Marshall, was under a duty to provide him with a safe means of disembarking

and with assistance in disembarking. It was not up to Marshall to secure these things for himself, but it was up to respondent to supply them. The admiralty doctrine of comparative negligence applies to this case. No one denies this, although this court does not refer to this doctrine in its opinion. If the means supplied to Marshall to disembark were so unsafe that he was negligent in using them, then respondent in furnishing Marshall with such means must have violated its duty to use the highest degree of care to protect him; therefore, under the admiralty doctrine of comparative negligence, respondent is liable, not for the full amount of damages suffered by Marshall, but for a fair proportion of such damages. There is absolutely no escape from this argument. We respectfully request this court, in fairness to Marshall, to consider it.

What this court decided in this case will, if its decision stands, undermine the old and salutary principle that a common carrier of passengers must exercise the highest degree of care to protect them.

This court, in reviewing the evidence which it says supports the trial court's findings to which we are about to refer, says:

“ . . . As Marshall descended the gangway, the Captain was behind him. Two seamen were on the barge scraping and painting the side of the vessel. Assistance was available to Marshall in reaching the barge, if he had wished it, but, when he arrived at the lower platform of the gangway, he decided to jump . . .

“ Marshall testified that the Captain was close behind him and that he jumped because he had

the impression from the silence of the Captain that the latter had commanded Marshall to jump. Marshall testified he saw no one on the barge and that he heard no warning. . . .”

Marshall at no time said that the captain “commanded” him to jump. What he said was that when he reached the lower platform of the gangway, he paused there for any instructions the captain might want to give him and that when the captain said nothing, he concluded that the captain by his silence was directing (not “commanding”) him to jump.

This court, after saying that the evidence reviewed by it supports the trial court’s findings that the vessel furnished Marshall with a safe means of disembarking and provided efficient officers and employees to superintend his disembarking, states the crux of its opinion, that is, its decision which, as authority, will control the disposition of other cases in this circuit. It says:

“ . . . If Marshall decided not to wait for assistance when he could see that there was a possible hazard, *he assumed the responsibility*. It was found also that he disregarded a warning shout of a crew member. *His want of due care in these matters prevents his recovery.*” (italics ours)

It thus appears that the proposition held by this court—the proposition for which the opinion will stand as authority—is that when a vessel furnishes a passenger with a means of disembarking which is hazardous, the passenger must wait or call for assist-

ance in the use of such means, and if he does not do so, he assumes the risk and such negligence on his part precludes his recovery; the passenger must wait or call for assistance under such circumstances even when the master of the vessel—the officer upon whom rests the primary duty to exercise the highest degree of care to protect him—is superintending his disembarkation and does absolutely nothing to provide assistance for him.

This decision is a direct and clear repudiation of the rule that a carrier must exercise the highest degree of care to protect its passengers. It is a direct and clear repudiation of the principle that a master of a vessel is charged with a special duty with respect to his passengers, a duty to use “the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances”.

It is a decision that a vessel may furnish a passenger with an unsafe means of disembarking, and then prevent him from recovering for his injuries in using such means on the ground that he was negligent in using them.

Since Marshall argued that the doctrine of comparative negligence should be applied to the case, this court, we respectfully submit, in fairness to Marshall, should have considered the point and not have ignored it. Despite the fact that the court did not allude to the point, its decision is an implicit, and at the same time, an obvious repudiation of the doctrine.

We respectfully submit that the decision is unjust to Marshall; that it violates old and fundamental principles; that it creates bad law; and that therefore a rehearing should be granted.

Dated, San Francisco, California,
June 10, 1958.

MORSE ERSKINE,
ERSKINE, ERSKINE & TULLEY,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,

June 10, 1958.

MORSE ERSKINE,

*Of Counsel for Appellant
and Petitioner.*

No. 15,611

United States Court of Appeals
For the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant,

VS.

WESTFAL-LARSEN & Co.,

Appellee.

APPELLANT'S CLOSING BRIEF.

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FILE

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PAUL P. O'BRIEN,

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No. 15,611

United States Court of Appeals For the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant,

VS.

WESTFAL-LARSEN & CO.,

Appellee.

APPELLANT'S CLOSING BRIEF.

I. MARSHALL HAS NEVER CONTENDED THAT RESPONDENT WAS AN INSURER.

Respondent states that Marshall's brief is "premised on the proposition that appellee is an insurer of appellant's safety" (RB 3)¹ and that in his brief Marshall has taken "the untenable position that the mere happening of an accident to a passenger is sufficient to enforce a liability upon the carrier." (RB 8, 19.)

These statements are entirely incorrect. At no point in this litigation has Marshall taken the position that respondent was an insurer. (See pages 6-11 of our opening brief.)

¹We shall cite respondent's brief in this way, that is, by the letters "RB"; and we shall cite Marshall's opening brief by the letters "MB".

II. THE OLD ADMIRALTY RULE THAT THERE SHOULD BE A TRIAL DE NOVO ON APPEAL NO LONGER GOVERNS, BUT RULE 52(a) APPLIES TO ADMIRALTY CASES AS IT DOES TO OTHERS.

On page 29 of our opening brief we stated that under the Admiralty doctrine of a trial *de novo* on appeal, the appellate court would accept the findings of the trial court as correct unless such findings were clearly “against the weight or preponderance of the evidence.”

Respondent is correct in saying that under the recent case of *McAllister v. United States*, 348 U.S. 19, 75 S. Ct. 6, this old admiralty rule is no longer the law. In that case the Supreme Court held that no greater scope of review can be exercised by the courts of appeal in admiralty cases tried without a jury than in other cases; and that Rule 52(a) should be applied in such cases.

Since it is important to bear in mind in this case the standards which should be applied in determining whether a finding is “clearly erroneous” within the meaning of Rule 52(a), let us quote the well-known interpretation of the rule stated by the Supreme Court in the *Gypsum* case (*United States v. United States Gypsum Co.*, 333 U.S. 364, 365, 68 S. Ct. 525). In that case, the court stated that Rule 52(a) was intended, in all actions tried by the court without a jury, “to make applicable the then prevailing equity practice”; and it then went on to say:

“... The practice in equity prior to the present Rules of Civil Procedure was that the findings

of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'*²

The Court of Appeals of this circuit, of course, has followed this interpretation of Rule 52(a). See *Gillette's Estate v. Commissioner*, 9 Cir., 182 F.2d 1010, 1014; and *Pacific Portland Cement Co. v. Food Machinery and Chemical Corporation*, 9 Cir., 178 F.2d 541, 548.

In the latter case, this court, after quoting the rule of the *Gypsum* case, said:

"As a corollary to the rule, we may make our own inferences from undisputed facts or purely documentary evidence. For, to use the colorful language of the Court of Appeals for the Third Circuit, the rule does not operate 'to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings.' Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 119 F.2d 704, 705."

In the *Kuhn* case, the Court of Appeals of the Third Circuit, after making the "colorful" statement just quoted, went on to say:

"The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate

²All italics in this brief will be ours unless otherwise indicated.

fact remains appropriate matter for an appellate court's consideration. . . . Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. . . . An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the correction whereof on appeal Rule 52(a) specifically provides."

Marshall contends that the conclusions of the trial court in the case at bar that the respondent did not fail to furnish Marshall with a safe means of disembarking and did not fail to provide men to safeguard and superintend his disembarking were inferences and conclusions drawn by the trial court from its own findings and the undisputed evidentiary facts; that these conclusions remain "appropriate matter" for this court's decision; and that this court should find them "clearly erroneous" because they are not only not supported by substantial evidence, but are directly contrary to the uncontradicted evidence.

**III. THE TWO BASIC ISSUES PRESENTED BY THIS APPEAL;
IT IS ESSENTIAL TO THE PROPER DISPOSITION OF THE
CASE THAT THEY BE KEPT DISTINCT.**

These two issues are as follows: First, is the conclusion of the trial court, that respondent did not fail to exercise the high degree of care it owed Marshall, supported by the court's findings of the specific facts and substantial evidence; in other words, is it

clearly erroneous; and secondly, was Marshall himself negligent?

Respondent does not challenge Marshall's contention (MB 49-50) that the admiralty doctrine of comparative negligence should be applied to this case; it merely says that the doctrine is not applicable because the trial court's finding that Marshall's injuries were due solely to his own negligence is supported by the evidence (RB 19-20).

But if the findings of specific facts and the evidence show that respondent failed to exercise the high degree of care it owed Marshall, Marshall under the doctrine is entitled to recover even if he himself was negligent.

It is essential, therefore, to the proper disposition of this appeal that these two crucial issues be kept distinct.

IV. THE FACTS SPECIFICALLY FOUND BY THE COURT AND THE EVIDENCE SHOW WITHOUT CONTRADICTION THAT RESPONDENT VIOLATED THE HIGH DUTY OF CARE IT OWED MARSHALL.

1. **There is an obvious and glaring contradiction in respondent's entire argument.**

In the first place, respondent argues in effect that the means furnished by it to Marshall to enable him to disembark were so safe that it was not necessary for it to provide competent men to assist him in disembarking; and in the second place, it argues that Marshall in using the means so furnished him, in the face of Nelson's warning, was negligent.

The two contentions are simply irreconcilable. If the means of disembarking were safe; if the barge was a stable platform; if Marshall had been obliged, not to jump but only to step off, then obviously there would have been absolutely no reason for Nelson to call to Marshall not to jump and there could have been no negligence on Marshall's part.

But Nelson did call to Marshall not to jump. Why? Obviously because Nelson saw that it was not safe for Marshall to jump. If Nelson, an ordinary seaman, engaged in scraping and painting the ship and charged with no duty with regard to Marshall, knew this, certainly the captain must have known it; and it was the duty of the captain "to protect" Marshall "from harm with the care, skill and prudence which an 'exceedingly competent and cautious man would bring to the task in like circumstances.' "

And why did the trial court find that Marshall was negligent in making the jump? Because the court believed that, in the face of Nelson's warning, he had used an unsafe way of getting off the ship.

The fact that Nelson did call to Marshall not to jump; the fact that the court found Marshall negligent; these facts in themselves demonstrate that the respondent did not furnish Marshall a safe means of getting off the ship, that it failed to exercise the high degree of care the law imposed upon it.

2. Respondent did not take any steps to safeguard Marshall when he made his jump.

As Marshall pointed out in his opening brief (pp. 17-18, 23-24), the court's findings of specific facts and the uncontradicted evidence show that the captain did not get down onto the barge to assist Marshall in descending; that neither the captain nor Kaldefoss ordered Nelson and Nordfonn to so assist Marshall; that respondent did fail to provide officers and employees to superintend Marshall's disembarking; and that it did fail to take any means whatever to safeguard Marshall while he was disembarking. The captain simply let Marshall take his jump without any assistance of any kind.

Respondent cannot and does not challenge what we have just said. In failing to make such a challenge, in trying to ignore and gloss over the fact that the captain let Marshall, in effect tacitly directed Marshall, to take his jump without help, respondent, we maintain, is in effect conceding that it failed utterly to provide men to superintend and safeguard Marshall's disembarking, and that, therefore, it failed to perform the duty it owed him.

The only finding that the trial court made with respect to what we have been discussing is that "Assistance was available to libelant in reaching the barge, if he wished it." But as Marshall pointed out on pages 18-19 of his brief, the question is not what Marshall wished, but whether respondent performed its duty of safeguarding him when he made his jump, which proved to be dangerous, by providing compe-

tent men to assist him in getting onto the barge. And respondent, as we have said, does not and cannot challenge our statement that it failed utterly to do these things.

3. Respondent did not furnish Marshall with a safe means of disembarking.

Respondent says that at other ports at which passengers from the vessel disembarked, they moved from the lower platform of the gangway to a small shore boat which would "bob around" and was not as stable as the barge. But respondent fails to mention that when passengers got into such a boat, there would be an officer, or a seaman, on the lower platform to assist the passengers into the boat and that the man in charge of the boat would be there to take hold of a passenger as he left the lower platform and help him into the boat (R 54-55).

The trial court found that there was a swell to the sea which moved the barge *up and down under the gangway from two to three feet*; that Marshall "*jumped*" from the gangway platform to the barge while "it" was rising on a swell and before it had reached its crest; and that when Marshall landed on the barge he was "*pitched*" by its movement to his left; and that he, "in order to avoid being thrown down the forward hold of the barge turned sharply "twisting and injuring his knee" (R 14-15).

The court did not find how far the lower platform was above the deck when Marshall jumped, but it did not find that he stepped off the platform to the

barge. On the contrary, it found that he “*jumped*,” which certainly implies that there was a substantial distance from the platform to the barge, such a distance as would require a jump.

Despite these findings of the trial court, respondent in its brief tries to give the impression that Marshall was not obliged to jump; that really all that he was required to do was to step off the gangway’s platform to the deck of the barge. It says that the lower platform of the gangway was “*slightly* above the deck of the barge when it was at the crest of the swell” (RB 9); and it refers to Nordfonn’s testimony that the barge was still rising on the swell when Marshall jumped and that at that time the lower platform was about one-half a meter (19-20 inches) above the deck of the barge (RB 9-10).

Respondent says that Nordfonn was “in an excellent position to judge the distance between the lower platform and the barge” (RB 9-10).

Nordfonn testified that he was “on the afterend of the barge,” a little aft of K4 on Kaldefoss’ rough drawing (ND 3-4); in other words he testified in effect that he was about sixty-five to seventy-five feet from the gangway’s lower platform. (See page 36 of our opening brief for a more complete discussion of Nordfonn’s testimony in this regard.) Kaldefoss placed Nordfonn at about the same place (MB 35-36). The captain said that Nordfonn was in the after end of the barge and that he believed it was Nordfonn who was pulling on the line that tied the after end of the barge to the ship when Marshall was descend-

ing the stairs. (The captain's testimony in this regard is quoted on pages 38-41 of our opening brief.) Since Nordfonn was at least sixty-five to seventy-five feet from the platform and since, as found by the court, the barge was being moved up and down two to three feet by the swell, he was not in "an excellent position" to judge the distance; he was in a poor position to judge it.

Kaldefoss, on the other hand, was standing at the head of the gangway above the platform. He testified that when, as in this case, a gangway is lowered onto a barge being moved up and down by a swell, it is always maintained rather high off the barge so that the barge cannot be lifted by the swell high enough to strike the gangway, and that when the gangway involved in this case was lowered, it was rigged in accordance with this practice (KD 21). (This testimony of Kaldefoss is quoted on page 23 of our opening brief.) And he then testified that when Marshall descended the gangway, its lower platform was about two to three feet above the deck of the barge (KD 10).

Marshall testified that when he reached the lower platform, it was two or three feet above the deck of the barge (R 43-44).

In the light of this testimony, respondent cannot succeed in its effort to give the court the impression that the platform was only slightly above the deck of the barge when it reached the crest of its swell. If this had been the case, a small increase in the swell would have dashed the heavy steel barge against

the gangway and have seriously damaged it. It was rigged to avoid the possibility of such damage.

As found by the court, Marshall was obliged to jump from the platform to the barge. If Nordfonn was right in his estimate that at the moment Marshall jumped the barge was still rising and the platform was about one-half a meter (19 to 20 inches) over the deck of the barge, that under the circumstances was a substantial jump, a jump which as Nelson saw might expose Marshall to danger and did actually expose him to the grave danger of being thrown down the forward hold. But the fact is that the gangway was necessarily rigged high enough above the barge so that it would not be struck when the barge was lifted by the swell. No one was there with a ruler to measure the distance, and no one can say exactly what point in its rise the swell had reached when Marshall jumped; but he was not able to step off the platform onto the barge; he was obliged to make a substantial jump onto the unstable deck of the barge. As he testified, he did not know what "a swell could do to him," but the captain and Kaldefoss knew. But the captain did not get down onto the barge before Marshall jumped to assist him. Neither he nor Kaldefoss ordered the two men working on the barge to assist him. They did absolutely nothing to protect him. And when he landed on the barge, he was, as the court found, pitched by its movement and was obliged to turn sharply to save himself from being thrown down the forward hold (which might have killed him). In so turning, he suffered

the injuries for which he is seeking in this action to recover.

4. Conclusion with respect to the first issue that respondent failed to furnish Marshall with a safe means of disembarking, and to provide men to superintend and safeguard his disembarking.

This court is free to draw from the specific findings of the trial court and the uncontradicted evidence in the case the ultimate inferences and conclusions which in its opinion the findings and uncontradicted evidence reasonably induce.

The fact that Nelson felt called upon to try to warn Marshall; the fact that the trial court found that Marshall was negligent in using the means furnished him to disembark, in themselves demonstrate that these means were not safe.

Respondent failed entirely to provide men to safeguard Marshall's disembarking.

Marshall was obliged to jump a substantial distance to the deck of the barge, which was being moved up and down two to three feet by the swell. He did not know what a swell could do to him; but he found out; when he landed he was pitched by the swell and was obliged to turn sharply to avoid being thrown down the empty hold.

There cannot be the slightest doubt that respondent failed to exercise the very high degree of care it owed Marshall to furnish him with a safe means of disembarking and to provide competent men to safeguard him when disembarking.

V. THE FINDINGS AND EVIDENCE SHOW THAT MARSHALL WAS NOT GUILTY OF NEGLIGENCE; BUT IF HE WAS, UNDER THE ADMIRALTY DOCTRINE OF COMPARATIVE NEGLIGENCE HE WAS STILL ENTITLED TO RECOVER.

1. As found in effect by the trial court, the captain descended the stairs behind Marshall.

It is true that the captain testified that his recollection was that Marshall jumped when he and Kaldefoss were talking at the head of the gangway; that he was not on his way down the stairs of the gangway at that time; and that he thought Marshall was on his feet when he started down the stairs (SD 15-17).

Marshall testified that the captain followed him down the steps of the gangway (R 43) and that the captain was two or three steps up the gangway when he jumped (R 68).

Nordfonn testified that he saw Marshall for the first time when he was standing on the lower platform of the gangway; that at that time the captain was on the stairs descending from the upper platform "directly behind" Marshall, "possibly a couple of meters away."

In its brief respondent refers to the testimony of the captain which we have just mentioned, that is, the captain's testimony that when Marshall jumped, he was still on the upper platform at the head of the gangway talking to Kaldefoss; and then respondent in the next sentence says:

" . . . Thus the captain was behind Marshall as he descended the gangway and as the court found, but at a considerably greater distance than

the two or three steps claimed by Marshall” (RB 11).

This is just an attempt to reconcile the captain’s testimony with what the court actually found concerning the point. The attempt was entirely unsuccessful. The court did not find that the captain was at the head of the gangway talking to Kaldefoss when Marshall jumped; but it found that “As libellant descended the gangway the captain was behind him.” This is not, to be sure, a finding that the captain was two or three steps up the gangway from Marshall when Marshall jumped; but when the words are read in context and are given their ordinary meaning, they can mean only one thing; and that is, that the captain descended the stairs behind Marshall.

Both Marshall and Nordfonn testified that the captain was only a few stairs behind Marshall when the latter jumped. But it makes no difference how far up the stairs he was from Marshall; and indeed it would make no difference if the captain had been at the head of the gangway talking to Kaldefoss when Marshall jumped. The captain testified that when he was talking with Kaldefoss at the head of the gangway, Marshall came on deck and walked by him and Kaldefoss down the stairs (SD 14). Whether the captain stayed there or went down the stairs behind Marshall, he, of course, knew that Marshall was descending the stairs to jump onto the barge; and he, being a seafaring man, knew that the moving barge could pitch Marshall when he jumped; and he knew, or should have known, that such a pitch

might throw Marshall down the empty hold and seriously injure, if not kill, him; and he did absolutely nothing to protect him. He did not tell Marshall to wait until he had gotten onto the barge so that he could assist Marshall. He did not order Nelson and Nordfonn to assist Marshall. He tacitly directed him to make the jump. He flagrantly violated the high duty of care which he, as master of the vessel, owed Marshall.

2. Marshall did not deny that Nelson and Nordfonn were on the barge when he jumped.

Respondent repeats in its brief that Marshall denied that Nordfonn and Nelson were on the barge and that his denial of this fact justified the trial court in disbelieving his testimony (RB 11-12, 14). Marshall did not deny that there were men on the barge; he testified that he did not see any men on the barge and did not hear Nelson call to him (R 68-70). (Marshall's testimony in this regard is quoted on pages 30-31 of our opening brief.) Nordfonn and Kaldefoss and the captain had all testified in their depositions that Nelson and Nordfonn were on the barge. At the trial, Marshall did not contradict them; there could be no question that the men were on the barge; all that Marshall said, as just stated, was that he did not see them or hear Nelson.

Marshall's testimony was corroborated in every respect by some or all of respondent's own witnesses, except with respect to this one fact, whether he saw and heard Nelson. He is a truthful and honest man, and there was no basis for rejecting his testimony.

3. When the "entire evidence" bearing on the point is considered, it is clear that the trial court's finding that Marshall ignored Nelson's warning is not supported by the evidence.

Whether this finding is or is not supported by the evidence depends on Nelson's position on the barge when Marshall jumped.

In our opening brief we discussed at some length the testimony bearing on the point (MB 32-45). We do not intend to repeat here what we said there; but we would like to call to the court's attention the summing up on pages 42-43 of our brief of the sharp and material contradictions respecting the point in the testimony of respondent's witnesses.

All that we should do here is to consider certain of respondent's comments with respect to the point.

Nelson, it will be recalled, testified that when Marshall was on the lower platform, he was painting and scraping the ship about twenty feet from the lower platform and that Nordfonn was within a meter or a half a meter from him (R 81-82, 95). (See pages 33-34 of our opening brief for a more detailed statement of his testimony.)

In its brief, respondent says that "Nelson's testimony as to his position on the barge was—supported" by the testimony of Kaldefoss and Nordfonn (RB 12-13).

It should be borne in mind that the sketch which Kaldefoss prepared to illustrate his testimony (which is attached to his deposition and referred to in our brief as Exhibit A) did not purport to be drawn to

scale; but quite the contrary. It shows, for example, the gangway much longer in relation to the ship and the barge than it should have been shown; and it does not show correctly the relation of the forward hold on the barge to the lower platform of the gangway.

The marks to which we are about to refer, "K3" and "K4," appear on Kaldefoss' sketch, Exhibit A.

We should first say here that we were mistaken in saying on page 37 of our brief that Nordfonn testified that Nelson was approximately at K5. Nordfonn testified that he was on the after end of the barge (ND3), a little aft of K4 (ND 4), and he then testified:

"Q. Will you point to approximately where Mr. Nelson was located?

A. Right here.

Q. You are pointing to K-3?

A. *I can't say for sure, but it was somewhere in the vicinity where I put my finger.*" (ND 4.)

Kaldefoss testified on cross-examination by Marshall's counsel:

"Q. Where were they [Nelson and Nordfonn] in reference to the lower platform when Mr. Marshall got onto the barge?

A. One here, *may be*, and one here (indicating).

Q. Would you mark that?

Mr. Gerhardt. We have got K-1 and K-2. Mark it K-3.

Mr. Erskine. Q. Where the dot is next to the letter and figure K-3, that was where one was?

A. Yes.

Q. Where was the other? Mark that K-4.

A. Here (indicating).

Q. What were they doing on the barge?

A. They were scraping and painting the ship's side."

He did not say which of the men was at each of the places so indicated by him.

The lower platform of the gangway was about opposite the forward coaming of the forward hold. Marshall so testified (R 45); and the court so found (R 14-15). Applying the scale on which Exhibit 1 was drawn (one-eighth of one inch to the foot), the lower platform of the gangway was, therefore, about ten feet from the prow of the barge.

Kaldefoss' mark K-3 was a few feet forward of the middle of the barge, about opposite the forward coaming of its middle hold, and Kaldefoss' dot was alongside and a little forward of K-3. The barge, as Kaldefoss testified, was one hundred feet long. Assuming that Kaldefoss' vague indication of Nelson's position on the barge should be considered at all in determining Nelson's approximate place on the barge, we should say that Kaldefoss placed him about forty to forty-five feet from the prow of the barge, or about thirty to thirty-five feet from the lower platform of the gangway, and assuming that Nordfonn's equally vague indication of Nelson's position should be considered for such purpose, we should say that he placed him at about the same distance from the lower platform as Kaldefoss.

Respondent, therefore, is not correct in saying that Nelson's testimony as to where he and Nordfonn were on the barge is corroborated by Nordfonn and Kaldefoss. Nordfonn and Kaldefoss' testimony in this regard is in conflict with that of Nelson as to where he was and their testimony sharply contradicts Nelson's statement that Nordfonn was right alongside of him, one-half a meter to a meter away.

But under the rule this court in determining where Nelson was should consider "the entire evidence"; and so it is essential that it should have in mind the captain's testimony.

Respondent is incorrect in its statement that the captain "could not locate" the men "accurately" on the barge (RB 14). The captain recalled incidents involving the men which enabled him to place the men in a manner which carries conviction. The captain on his direct examination said that Nelson "was on the after end of the barge" and that Nordfonn was "back there" too (SD 8); and then he, on cross-examination, located them at B on Exhibit A, a point about ten to fifteen feet from the end of the barge; and in doing so he said that "That kind of picture is blurred," but that that was approximately where they were (SD 20).

In this testimony the captain was entirely definite in locating the men at the after end of the barge, but was somewhat uncertain in fixing their exact location.

But he was not at all uncertain in his later cross-examination when he testified that when Marshall was

going down the steps of the gangway one of the men (he believed it was Nordfonn, but was not sure) was "putting his weight on the line," which tied the barge to the ship, "so as to pull the barge in" to the ship, and that he a little later shouted to the men not to pull any more because Marshall was then on the barge and he was worried that as the barge was brought in under the lower platform of the gangway, the gangway might strike Marshall (SD 17-21). (This testimony is quoted at length on pages 38-41 of our opening brief.)

Parenthetically we should say that this testimony of the captain makes it perfectly clear that the lower platform was considerably higher than the barge, because if it were not, there would have been no basis for the anxiety concerning Marshall which the captain felt.

But the point here is that the captain could not have imagined and could not have been mistaken about incidents of this sort. His circumstantial account of what happened must be accepted as true. Since he remembered these incidents so clearly, he must have remembered the position of the men taking part in them. And so his testimony placing them in the after part of the barge should, we submit, be accepted as correct.

It follows that Nelson's testimony, that when Marshall was on the lower platform he was painting and scraping the ship about twenty feet away and that Nordfonn was working about one meter away from

him, cannot be accepted as correct, and that this court should conclude, on the basis of the entire evidence, that both he and Nordfonn were in the after part of the barge.

4. **This court should infer that neither the captain nor Kaldefoss heard Nelson's warning.**

Neither Kaldefoss nor the captain testified that they heard Nelson call to Marshall.

Marshall claims that since they did not so testify, he has a right to infer that they did not hear Nelson (MB 31).

Respondent says that Marshall does not have the right to draw such an inference (RB 14).

31 C.J.S. 849 states the applicable rule as follows:

“ . . . It has also been held that, where a party fails to present a fact necessary to his case when it is within his power to do so, it will be presumed that such fact does not exist.”

In *Interstate Circuit v. United States*, 306 U.S. 208, 226, 59 S. Ct. 467, 474, the court said:

“ . . . The production of weak evidence when strong is available can only lead to the conclusion that the strong would have been adverse [citing cases]. Silence then becomes evidence of the most convincing character [citing cases].”

In *Halpine v. Halpine*, 138 Conn. 578, 87 A.2d 146, the plaintiff called defendant as a witness and proved by her certain incidental facts, but did not examine her with respect to the crucial issues. When the time came for defendant to prove her case, she did not take

the stand to testify with respect to such issues. The trial court charged that no unfavorable inference should be drawn from her failure to do so. The upper court, in setting aside the judgment for defendant, said:

“ . . . If counsel for the defendant had reason to believe that her testimony would strengthen her case, there was no reason why she should not have been called by them. As she was not called, there is no injustice in permitting an inference that, if called, her testimony would have favored the plaintiff.”

Since it would have strengthened respondent's case if the captain and Kaldefoss had testified that they heard Nelson, it must be inferred from their silence that they did not hear him. Since the captain and Kaldefoss did not hear Nelson, why should Marshall have heard him?

Respondent also says that since Kaldefoss and the captain were at the head of the gangway in conversation, there was no reason why they should have heard Nelson (RB 14-15). But, as we have pointed out, the trial court found in effect that the captain descended the stairs behind Marshall, and as we have also pointed out, Nordfonn testified that the captain was directly behind Marshall, “possibly a couple of meters away,” and Marshall testified to the same effect. If Nelson had been only twenty feet from the lower platform when he called, the captain would most certainly have heard him. In fact, he would have heard him under such circumstances if he had been at the top of the gangway.

5. Assuming Marshall heard Nelson, still he was not negligent in using the means of disembarkation furnished him and in following the captain's tacit direction to jump.

In the first place, as illustrated by the *Burrows*, *Mawson* and *The Ocracoke* cases (see pp. 8-10 of our opening brief for a review of these cases), when a passenger is furnished a means of disembarking, he is not under any duty to order other or better means, or to order assistance in their use, but the obligation to furnish safe means and assistance rests on the vessel. It cannot be the law that a vessel may furnish a passenger with an unsafe means of disembarking and then maintain that his use of it was negligent.

If Marshall heard Nelson's warning, he was in this predicament: The master of the ship was going off the ship with him and was behind him, and was tacitly directing him to use the means of disembarking which had been furnished him, and to make the jump; whereas Nelson, a sailor engaged in work on the barge, was telling him not to jump. Marshall, not knowing what a pitch of the barge would do to him, followed the captain's tacit direction to use the means of disembarking which had been furnished him. He cannot be charged with negligence in so doing.

Respondent tries to meet this argument by saying in effect that a vessel's duties to its passengers are performed by the entire ship's company and not just by the captain, "and that consequently Marshall had no right to follow the captain's directions, but that he should have obeyed Nelson's warning" (RB 16-17).

The point is specious and ignores the essential facts.

Marshall testified that he stood on the gangway's lower platform a few seconds; that the distance to the deck of the barge seemed "a safe distance"; and that he jumped, not knowing "what a swell could do to" him (R 68, 71). (This testimony is quoted in full at pages 25-26 of our opening brief.)

Assuming Marshall heard Nelson's call, he may have heard it just when he was in the act of jumping and so could not have stopped his act.

Whether or not this was so, in our situation the captain was under both a general and special duty with respect to Marshall. As stated in *Voltmann v. United Fruit Co.*, 2 Cir., 147 F.2d 514 (cited on page 7 of our opening brief), a master of a vessel is under a duty "to protect" each of his passengers "from harm with the care, skill and prudence which an exceedingly competent and cautious man would bring to the task in like circumstances."

In our situation, the captain owed Marshall not only this general duty, but a special duty as well, because he and Marshall were going ashore together and he was behind Marshall on the gangway. And so he, as the master, was in direct charge of furnishing Marshall the means of disembarking being used and to superintend and safeguard him in its use; whereas Nelson, a seaman who was engaged in scraping and painting the ship, was not charged with any duty with respect to Marshall.

Under these circumstances, Marshall most certainly had the right to assume that the captain, to quote re-

spondent, would "serve his needs"; and he had the right to follow the captain's tacit instructions; and he cannot be held negligent in doing so, even if he had heard Nelson.

But even if it be assumed that Marshall was negligent because he heard and ignored Nelson's warning, still the fact that he was negligent certainly did not exonerate respondent from the obligation it owed Marshall to exercise the highest degree of care to furnish him with a safe means of getting off the ship and in providing men to assist him.

Respondent cites *Erdman v. United States*, 2 Cir., 143 F.2d 198, in support of its argument that when Nelson called to Marshall, it had performed all the duty it owed him.

But there is no analogy between the *Erdman* case and the case at bar. In that case, the libelant, a passenger, was injured in using a swimming tank despite the fact that he was warned by ropes stretched across the entrance to it (a warning that he understood), that under the circumstances it was dangerous to use the tank and that he was forbidden to use it. The trial court held that both sides were negligent and divided the damages. The majority of the Court of Appeals reversed the trial court, holding that the vessel had fulfilled its duty to the libelant in thus forbidding him to use the tank and that therefore he was not entitled to recover.

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obliged to assume that a steward, who was at hand to attend to the wants of the passengers who were lying or sitting about, did not warn the libelant not to go into the pool, and that consequently there "was a failure in that extreme care which the law exacts of a carrier of passengers."

The distinction between this case and the case at bar is simple and obvious. In the *Erdman* case, the passenger had been forbidden to use the tank in its dangerous condition, whereas in the case at bar Marshall had not been forbidden to use the means of disembarking which he did use; on the contrary, it was the only means of getting off the ship and he used it under the direct supervision and at the direction of the captain.

In the *Erdman* case, the majority held that the vessel had fully performed its duty in forbidding the passengers to use the tank; whereas, in the case at bar, respondent certainly did not perform the duty it owed Marshall to furnish him with a safe means of disembarking and to provide men to safeguard its use.

And so in the case at bar the respondent was negligent, even if it be held that Marshall heard and ignored Nelson's call and was therefore negligent (which, of course, we deny).

VI. CONCLUSION.

The cases cited by respondent are briefly reviewed in the appendix to this brief. Each of them is very different from the case at bar. In each of them the vessel had not failed to exercise the high degree of care it owed its passenger and the latter's injury was due solely to his own negligence.

Each case of this sort must be decided on its own facts and on the principles established by the law. There can be no doubt with respect to the principles which should be applied in deciding this case. The rule is that a passenger is "entitled to have a carrier exercise for his safety as much skill, care and prudence as an exceedingly competent and cautious man would bring to the task in like circumstances"; and the rule also is that a carrier, in the performance of this duty, is required to furnish passengers with a safe means of disembarking and to provide competent men to render such services as are necessary to get passengers safely ashore.

Neither can there be any doubt, in view of the trial court's findings and the uncontradicted evidence, that respondent's failure to perform these duties caused Marshall's injury and might have caused him much more severe injury than those he suffered or even his death.

Marshall himself was not negligent; but if it be held that he was, still under the admiralty doctrine of comparative negligence, he was nevertheless entitled to recover.

We respectfully submit that, as stated in our opening brief, this court should reverse the judgment with directions to the lower court to determine the amount of Marshall's damages and to enter judgment for him for that amount.

Dated, San Francisco, California,
February 19, 1958.

Respectfully submitted,

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ERSKINE, ERSKINE & TULLEY,

Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

A BRIEF CONSIDERATION OF RESPONDENT'S CASES.

In *The Empress of Scotland* (D.C. S.D. N.Y.), 11 F.2d 783, the vessel had stationed its chief officer at the bottom of the gangway to assist passengers onto the tender and it placed two seamen on the tender to assist passengers boarding it. The trial court held that the vessel had provided sufficient men to render any necessary assistance that might be required by its passengers and that, therefore, the libellant's injuries were not due to any negligence on its part.

In *The Vulcania* (D.C. Mass.), 8 F. Supp. 300, a steward had been placed in a motor boat to assist passengers from a life boat to the motor boat and from the latter boat to the dock. When the steward's back was momentarily turned, plaintiff attempted to move from the life boat to the motor boat without waiting for aid from the steward and was injured.

In *Goode v. Oceanic Steam Navigation Co.*, 2 Cir., 251 F. 556, the life boat into which plaintiff was stepping was practically motionless and it was necessary for plaintiff to step down only six inches. Two men were stationed in the boat to assist passengers and one of them in fact assisted plaintiff and exercised what was held to be due care in doing so.

In *Weill v. Compagnie Generale Transatlantique*, 2 Cir., 113 F.2d 721, the passenger tripped "on the end of a tarpaulin spread *smoothly* (italics ours) on

the deck.” There was no negligence on the part of the vessel and the passenger was obviously not watching his step.

In *Plant Investment Co. v. Cooke*, 2 Cir., 85 F. 611, plaintiff was walking on defendant’s dock for the purpose of boarding the ship. Plaintiff had two ways of reaching the ship; one, which had been provided by defendant, was over a cleated gangplank which was safe, and the other was over an incline which was slippery and unsafe. She, with knowledge of the danger, chose the latter and was injured.

In *Fetan v. Atlantic and Caribbean Steam Nav. Co.* (D.C.E. N.Y.), 60 F.2d 328, the plaintiff, who was late in returning to the ship, hired a private motor boat, not in charge of any employee of the vessel, to return him to it.

The court found that he, without the knowledge of any officer or seaman of the vessel, attempted to climb a ladder to its deck while it was moving.

In *re Keansburg Steamboat Co.*, 2 Cir., 249 F. 472, plaintiff walked into a narrow dangerous passageway on the ship where she tripped over some rope. Plaintiff had been repeatedly warned by the mate not to enter the passageway.

No. 15611

In the

United States Court of Appeals

For the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant,

vs.

WESTFAL-LARSEN & Co.,

Appellee.

Appellee's Opening Brief

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I.

STATEMENT OF CASE

Appellant's statement of the case is inaccurate in respect of certain facts. Appellant also sets forth alleged facts which were not accepted by the Court below.

At the port of Corral, Chile, and at the time of the accident there was not a general exodus or disembarkation of passengers from *The Hardanger* similar to that which had occurred for sightseeing purposes at other ports. The Captain and Marshall, who were friends, were going ashore by themselves early in the morning for a trip up river to Valdivia. At other ports the passengers were disembarked directly to a small shore boat or tug from the foot of the gangway. At Corral, Chile, there was a 100-foot barge at the foot of the gangway. It was necessary to cross this

barge in order to reach the shore tug. The barge was quite stable in the water as compared with a small shore boat or tug. The barge was moving up and down from two to three feet in a harbor swell, but the lower platform of the gangway was not always two or three feet from the lower platform except at certain times according to the swell. At the time Marshall jumped, the barge was about $\frac{1}{2}$ meter or 20 inches below the gangway platform and was still moving up on a swell which had not yet reached its peak or crest. There were two of the vessel's seamen on the deck of the barge, one of whom Nelson, was within 20 feet and not more than 30 feet of the lower gangway platform, and who could have rendered assistance to Marshall if necessary. Nelson called to Marshall not to jump. Marshall disregarded this warning and jumped to the deck of the barge, landing in such manner that he twisted his knee.

There was no contention or evidence that there was any defect or insufficiency in the gangway as such or in the barge as such. There was no evidence of any unseaworthiness of *The Hardanger* or of any negligence on the part of the respondent appellee. All of the evidence and the Court's findings pointed to appellant's own fault and lack of care as the sole cause of his injuries.

II.

ERRORS

Appellant has adopted the position that this is a trial *de novo* and that the clear weight or preponderance of the evidence is contrary to the findings. We refer to the statement by the Supreme Court in *McAllister v. U. S.*, 348 U.S. 19, 20; 99 L.ed. 20, 24 as follows:

"In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not

set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the Appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. * * *

Thus a trial *de novo* is not required and the findings and judgment below are accepted as true unless clearly erroneous.

Appellant makes no objection to the conduct of the trial or to the court's rulings. Therefore, appellant's only assignment of error is that the lower Court's conclusions are erroneous. Appellant makes this broad general statement several times in his Opening Brief, and has attempted to establish such broad general assertions primarily by the constant repetition of appellant's own testimony and inferences therefrom.

III.

ARGUMENT

A. Legal Principles.

Appellant's brief is premised on the proposition that appellee is an insurer of appellant's safety. This is not true. Courts have time and again rejected this supposition.

"As a general rule, a vessel engaged as a common carrier of passengers must exercise as high a degree of care * * * as the means employed and the circumstances of the case will permit; but *the vessel is not an insurer* of the safety of its passengers." [Emphasis added] 80 C.J.S. "Shipping", Section 193-a; Accord. *The Serpa Pinto*, 45 F. Supp. 255; *Moses v. Compagnie Generale Transatlantique*, 16 F. Supp. 197; *The Empress of Scotland*, 11 F.2d 783; (D.C.S.D.N.Y. 1926); *Goode v. Oceanic Steam Nav. Co.*, 251 F. 556 (C.C.A. 1918); *The Vulcania*, 8 F. Supp. 300, D.C. Mass. 1934).

It was appellant, not appellee, in this case who did not act as a reasonably prudent person should have acted in the circumstances.

“If a passenger disregards a warning, which has been so given that he has notice of it, he cannot recover for injuries caused by the danger against which he has been warned.” 80 C.J.S. “Shipping”, Section 194-b. See also *Erdman v. United States et al.*, 143 F.2d 198 (C.C.A. 2 1944).

Appellant cited three cases purporting to show liability in this case as a matter of law. *Burrows v. Lownsdale*, 133 F. 250 (C.C.A. 9 1904); *Mawson v. Eagle Harbor Transportation Co.*, 148 Wash. 258, 265 Pac. 595; and *The Ocracoke*, 159 F. 552 (D.C.E.D. Va. 1908). None of these cases cited stands for such a proposition either as a matter of factual similarity or as a matter of legal principle. Furthermore, not one of those courts did what appellant asks this Court to do, namely reverse the findings of the District Court.

In *The Ocracoke* decision cited by appellant, the plaintiff had been told by defendant no gangplank would be used whatsoever. Therefore, if plaintiff desired to get off the ship, he would have to jump from the ship to the dock. He did so and was injured. This is hardly analagous to the case at hand where appellant was warned not to jump.

This case is not analagous to the *Burrows* and *Mawson* cases as claimed by appellant. In those cases the gangways were clearly defective, being narrow, long, at steep angles and without guard rails. Furthermore, in both cases the lower courts were being affirmed in their decisions and conclusions as to questions of fact and law. Thus, the principle of giving weight to the findings below was present.

There is no question that the gangway in this case was

not defective in any way. Of course, any gangway or any part of a ship that is used negligently by a passenger can result in his injury. The mere fact that someone is injured does not prove negligence. There are no findings of fact nor in fact any evidence that appellee did not provide a reasonably safe means for passengers to disembark from the vessel and the District Court so found.

In the following cases passengers were injured while disembarking from one vessel to another while the vessels rolled with the ocean swells. They all contended that the method of landing was unsafe and that they had inadequate or no assistance. The cases are *The Empress of Scotland*, 11 F.2d 783 (1926); *Goode v. Oceanic Steam Nav. Co.* 251 F. 556 (C.C.A. 2 1918); *The Vulcania*, 8 F.Supp. 300 (D.C. Mass. 1934). In all cases the Courts decided against any liability.

In *The Empress of Scotland* libellant was injured while disembarking from the main boat to a tender rolling from the movement of the sea. Libellant's position was that he had inadequate aid in disembarking. The court in *The Empress* case rejected liability stating:

"He had decided to go ashore as many of the other passengers had done; He knew as well as anyone that the tender was rolling for he had been observing it as he stood on deck, and while those ahead of him were boarding her. This was not his first experience around the water. He could not have failed to realize that there was some risk, though not a very great one, for an able bodied man, and the inference is that whatever injury he received must have been due to his own lack of care in watching the gunwale of the tender which he was about to step over." (Pages 784-85)

The District Court in this case made the same factual conclusion as to Marshall's lack of care and resulting injury.

In the *Goode* case the plaintiff was injured after descending the gangway onto a waiting launch to visit a harbor. After helping plaintiff step down into the launch, the seaman let go of her. The motion of the launch caused plaintiff to fall. The Circuit Court, in affirming the District Court, ruled that defendants were not negligent and was particularly concerned with the duty of a passenger to request assistance if necessary.

“We think that, if her control was not that of an ordinary person, it was incumbent upon her to ask for the extra assistance which was not otherwise indicated.”
(Page 558)

It is clear from the record in this case that assistance was available. The seaman on the barge warned Marshall not to proceed. Marshall nevertheless did so and was hurt.

In *The Vulcania* the plaintiff was disembarking from a lifeboat to a motorboat to the dock. In stepping from one boat to the other he fell and injured his leg. The lifeboat was drawn up beside the motorboat on the latter's portside so the two boats were in contact for some distance amidships. The sea was slightly choppy and there was a swell which caused a more or less continuous motion to the boats. Libelant did not wait for assistance, which he could have obtained. The court noted:

“Libelant was a vigorous man, in the prime of life who described himself as having been at the time unusually agile and active. I regard it as a fair inference of fact that his confidence in his ability to proceed without aid and his impatience led him to attempt to step from one boat to the other at a point somewhat nearer the stern than the point of contact between the two boats, and, while so doing a movement of one or both of the boats caused him to lose his balance and before he could regain it, he slipped off of or overstepped the seat on the motorboat and fell * * *” (Page 302)

Marshall, too described himself as an active person and it is a fair inference that he felt he could make the jump without waiting for a safer moment or without aid, in disregard of the warning given.

The court in *The Vulcania* further stated:

“The boats were staunch and seaworthy. * * * Libelant presented evidence tending to show transferring passengers from one boat to another is a procedure attended with hazards, but it added nothing to the dangers obvious to anyone of ordinary intelligence. Assistance was available for those who desired aid. * * * There is no suggestion of a refusal to lend aid in response to a request. If the libelant elected not to wait for assistance, he must assume the responsibility for the election and for its consequences.” (Page 302)

Appellant here made his own election not to wait for or ask for assistance and disregarded a clear warning. He therefore must take the responsibility for the exercise of that option. As the District Judge in this case found, so the Court in *The Vulcania* found:

“The want of due care on the part of the libelant as the sole contributing cause defeats his rights to recovery.” (Page 302)

In all these cases and in the case at issue, trial courts originally rejected a passenger's claim because of his own negligence as the sole proximate cause of injury. It is not unusual to bar a passenger from relief if he caused his own injury. See, for example, *Weill v. Campagnie General Transatlantique* 113 F.2d 721 (C.C.A. 2 1940) (Defendant not liable where plaintiff passenger tripped over tarpaulin spread on deck) *Erdman v. United States*, 143 F.2d 198, (C.C.A. 2 1944) (Defendants not liable to plaintiff passenger injured in swimming pool after disregarding warning) *Fetan v. Atlantic and Caribbean Steam Nav. Co.*, 60 F.2d

328 (D.C.E.D.N.Y. 1932) (Plaintiff's own negligence in failing to get to the ship on time and trying to get aboard a moving ship prevented his recovery) *In re Keansburg Steamboat Co.*, 249 F.472 (C.C.A. 2 1918) (Plaintiff's failure to hear or understand warnings not to walk in dangerous area precluded their recovery) *Plant Investment Co. v. Cooke*, 85 F. 611; (C.C.A. 5 1898) (passenger precluded from recovery because he used unsafe portion of gangplank when a safer way was provided).

B. Findings and the Evidence Support the Judgment.

Appellant has divided part of his argument into two headings devoted to B.—Findings and C.—Evidence. Since that treatment requires considerable repetition of the same points, appellee limits its argument to one heading with special sub-headings which will be devoted to the major points of disagreement.

References to the Transcript of Record are indicated by "TR" followed by the page number. References to the testimony in the depositions are indicated by the same symbols used by appellant:

"KD"—Kaldefoss' Deposition EX B (TR 102)

"SD"—Sellevald's Deposition EX C (TR 102)

"ND"—Nordfonn's Deposition EX E (TR 116)

As part of the argument on the findings and evidence appellant continued with the untenable position that the mere happening of an accident to a passenger is sufficient to impose liability upon the carrier. Appellant would thus make appellee an insurer without the necessity of proving any negligence or unseaworthiness. This is not the law.

Appellant's mere reiteration of the same points claimed

at the trial is not enough for reversal. There is in fact a presumption of correctness of the findings of fact of a trial judge who has seen and heard the witnesses. 2 C.J.S. "Admiralty" Section 190 (b)

The Trial Court with clear evidence to support its conclusions determined that Marshall ignored the warning not to jump, that the vessel did furnish a safe means of disembarkation, that Marshall did not exercise reasonably prudent care in disembarking and that Marshall alone caused his own injuries.

1. DISEMBARKATION AT CORRAL.

Although appellant attempts to draw a similarity between disembarkation at Corral, where the accident occurred, and other ports, the situation at Corral was different and actually safer than that usually available. This is evident from Marshall's testimony. At the other ports there were usually 6 - 8 passengers, including women going ashore (TR 64). It was necessary at these ports to disembark directly to a boat from the gangway (TR 54). They did not board the shore tug or launch at these other ports by descending first to a barge (TR 67). These shore boats had considerably greater movement than a barge (TR 65) and the barge was more stable (SD 26). The barge thus did not bob around as a small launch would, although as a result of a swell there was an up and down movement of from two to three feet. There was however, no fore and aft movement and no sideways movement (TR 70-71) as would be necessarily true of a small boat in a swell at the foot of a gangway. The bottom platform of the gangway was slightly above the deck of the barge when it was at the crest of a swell. Nordfonn on the barge was in an excellent position to judge the distance be-

tween the lower platform and the barge which he says was about $\frac{1}{2}$ meter (19-20 inches) when Marshall jumped and that the barge was still on the way up (ND 5, 11-12).*

Marshall was familiar with the situation and the risks. He had disembarked many times before and had been a passenger for a long time previously (TR 37, 63-65). In this instance Marshall knew the barge was riding a rising swell (TR 70). He knew assistance was immediately available if he needed it either from the captain or the seaman on the barge but did not ask for any. There is no question that the gangway was in safe and good condition and that the barge was a proper means of debarkation.

The trial Court properly ruled that Marshall's injuries were his own, not appellee's fault.

2. PRESENCE OF CREWMEN ON THE BARGE.

It is evident from appellant's entire argument that he initially tried to make it appear the Captain was the only one present. Appellant denied there was anyone on the barge (TR 66-69). Appellant also contends the Captain was within two or three steps behind him (TR 68). The Captain himself, however, said he was still on the upper platform at the head of the gangway talking to the Chief Officer (SD

* "Mr. Erskine: Q. Now, I believe you said, Mr. Nordfonn, that the lower platform of the gangway was about one-half of a meter above the deck of the barge, is that correct? A. Yes. (ND 11-12) Q. Was the distance from the lower platform of the gangway to the deck of the barge longer than the length of my arm from my shoulder to the end of my fingers? A. Is that the vertical distance? Q. Down from the height? A. It wasn't that much when he jumped. Q. It was less than that? A. Yes. Q. At that time the sea had a swell of about one meter, is that correct? A. Yes. The lighter was almost up, then. Q. Have you a clear recollection that at the instant Mr. Marshall jumped, the sea had reached—the sea as it was reaching the barge had reached to the top of its swell? A. It wasn't all the way up, but it was still on the way up when he jumped." (ND 12)

15-17).^{*} Thus the Captain was behind Marshall as he descended the gangway and as the Court found, but at a considerably greater distance than the two or three steps claimed by Marshall.

Irrespective of the Captain's position with relation to Marshall how does appellant try to avoid the warning given him by Nelson? As stated above he first tried to do so by claiming that no one else was on the barge. But the following testimony shows he observed the barge and must have seen men on the barge. Marshall paused on the way down the gangway. He stood there for about a minute and looked up to the deck, where the Captain was talking to Kaldefoss and he looked down at the barge (TR 120). He then went ahead down to the lower platform. He stood on the lower platform for several seconds (TR 120). He noticed the position of the barge; he noticed there was a swell (TR 43); he noticed the barge was unloaded and empty and he noticed the movement of the barge (TR 44). He looked at the barge (TR 45). He could see the complete deck of the barge (TR 68). He looked at the holds and he saw the passage alongside the holds (this is where Nelson was standing) was too

^{*} The Captain testified as follows: "Q. Now, did Mr. Marshall step or jump from the lower platform of the gangway while you were still talking to Mr. Kaldefoss or had you started to descend the stairs when he moved from the lower platform onto the deck of the barge? A. No. He must have jumped when we were standing there still talking. Q. You were not on your way down behind him at the time he jumped? A. No. Q. Your recollection is that you were still talking to Mr. Kaldefoss? A. Yes. (SD 15) * * * A. My recollection is that I was still at the head of the gangway talking to Mr. Kaldefoss when this happened. * * * Q. Where were you when you saw that; do you recall? A. I would say I was on the head of the gangway up on the platform. Q. You were up on the upper platform of the gangway? A. Yes. Q. And then when you saw that, you started down the stairs, did you? A. Yes. Or shortly afterward. I think that he was on his feet when I started down." (SD 16-17)

narrow (TR 69)—yet he still claimed no one was on the barge. He was faced, however, with the testimony of Captain Sellevald, the Chief Officer Kaldefoss and the two seamen Nelson and Nordfonn that the latter two men were definitely on the barge. Marshall's denial that crewmen were on the barge would certainly justify the Trial Judge's disbelief in his testimony.

Second, appellant tries to show that Nelson was on the stern of the barge and could not have given a warning which was heard by Marshall. Appellant tries to put Nelson and Nordfonn in a position on the barge contrary to fact. Nordfonn's position is not particularly important. Nelson who gave the warning, however, was close to Marshall.

3. LOCATION OF NELSON ON BARGE AND HIS WARNING TO MARSHALL.

In discussion covering fourteen pages of the Opening Brief (31-45) appellant makes many assumptions, and inferences in order to support his contention that Nelson and Nordfonn were 65-90 feet from Marshall while he was on the lower platform. Appellant contends there was therefore no ground for the Court to reject Marshall's testimony. But the Court did reject Marshall's testimony and had good ground to do so. The record is quite clear that Nelson was within 20 to 30 feet from Marshall when he warned Marshall not to jump, and was not 60 or 65 feet away. Marshall and Nelson both testified in person at the trial. Both of these men were observed by the Trial Judge. There is no question but that the Trial Judge accepted Nelson's testimony. Nelson's testimony as to his position on the barge was also supported by two other witnesses. The two diagrams Exhibit 1 and Exhibit D (Kaldefoss EX A for identification which is referred to by appellant as Exhibit A, but which was introduced as Exhibit D) (TR 103) and the marks JN and K3 on these two diagrams supported by appropriate

transcript and deposition references (hereinafter discussed) definitely show Nelson's position within 20 to 30 feet of Marshall and not 65 feet. In this connection it must be remembered that Exhibit 1, although drawn by appellant to a scale of $\frac{1}{8}$ of an inch to one foot, was based upon approximations of various witnesses rather than actual measurements (TR 33). But even on the basis of Exhibit 1 there is no foundation whatsoever for appellant's oft repeated comment that the two crewmen (Nelson and Nordfonn) were 65-90 feet from the lower platform and therefore from Marshall, when the warning was given.

Nelson, who gave the warning, testified he was at the point marked JN on Exhibit 1 (TR 81-82). By measurement on Exhibit 1 we find his position was between 18-20 feet from the foot of the gangway and was located opposite the aft end of No. 1 hold. Kaldefoss (KD 15) placed Nelson at the dot next to K3 of Exhibit D. It is noted that this dot is between the first two holds. K3 itself is at the forward end of No. 2 hold. Based upon the location of the gangway in Exhibit D, K3 was about 18-20 feet from the foot of the gangway, but even on the basis of Exhibit 1 there is only 10 feet between the aft end of No. 1 hatch (JN on Exhibit 1) and the forward end of No. 2 hold (K3 on Exhibit D) or about 5-7 feet from the aft end of No. 1 hatch to the dot at K3. Thus by relating Kaldefoss' testimony to Exhibit 1 which was not available at the time of Kaldefoss' deposition, Kaldefoss placed Nelson at not more than 25 to 27 feet from the foot of the gangway.

The other witness Nordfonn located Nelson by placing his finger at K3 (ND 4) about where Nelson was placed by Kaldefoss (KD 15). Thus if we accept Nelson's statement (JN on EX 1) he was within 18-20 feet of Marshall. But even by taking K3 on Exhibit D marked by Kaldefoss and

Nordfonn between the first two holds or the forward end of the second hold, Nelson was not more than 27-30 feet from Marshall.

Appellant's Opening Brief (page 37) has misquoted Nordfonn's testimony. Appellant quotes Nordfonn (ND 4) as locating Nelson at "K5" and then appellant makes measurements from K5 which was about the middle of No. 2 hold. Reference, however, to ND4 shows Nordfonn placed his finger on K3 of Exhibit D and not on K5 when he located Nelson's position.

Since Nelson testified that he was located at JN on Exhibit 1 which was 18-20 feet from the gangway and since Nordfonn and Kaldefoss placed Nelson at K3 or a dot next to K3 on Exhibit D which is 27-30 feet from the gangway there is certainly no basis for the long process invoked by appellant (Op. Br. 29-45) in reaching the conclusion that Nelson was 65 feet from Marshall. Nelson, Nordfonn and Kaldefoss all locate Nelson on the barge within an area of 8-10 feet near the after end of No. 1 hold and within 20-30 feet from Marshall.

The Captain although he knew two men were on the barge could not locate them accurately (SD 20). The other witness, appellant Marshall, denied there were any men on the barge at all. Thus the trial Court accepted Nelson's testimony.

We think it is obvious from the above that Nelson was close to Marshall, that Marshall saw Nelson and that he heard Nelson's warning.

In at least two places of the Opening Brief appellant makes an inference that neither Kaldefoss nor the Captain heard Nelson's warning. There is no testimony supporting appellant's inference. Neither the Captain nor Kaldefoss was asked any question as to whether he did or did not hear the warning. If they heard the warning, it would only have been cumulative of the testimony obtained from Nelson and

Nordfonn who were down on the barge. Since, however, Kaldefoss and the Captain were at the head of the gangway behind Marshall talking ship's business there is every reason why they should not have heard the warning given by Nelson. Appellant did not ask either of them about Nelson's warning. This is not, however, any foundation for appellant's inference that no warning was ever given.

Nelson testified:

"A. Well, when I saw Mr. Marshall come down the gangway, I tell him not to jump, I call up 'Don't jump.'

Q. Where was he when you said that to him?

A. He was down on the platform.

Q. On the lower platform of the gangway?

A. Yes.

Q. Go ahead.

A. And he didn't answer me, and just jumped, and when he landed on the deck he was falling, but I couldn't see how he came down on the deck. I just saw he was falling over, and after that was somebody coming down and helped him up, but who it was I cannot really remember." (TR 83)

Although Nelson said Marshall didn't answer, Nordfonn testified:

"Q. Did Mr. Nelson have any conversation with the passenger before he jumped? A. As far as I remember, I think he said to him that he shouldn't jump.

Q. Did the passenger make any reply?

A. Yes sir. He said something. There was something said to the effect that it was OK, and then he jumped." (ND 5).

What the situation would have been had Marshall heeded the warning is not necessary to determine. After Nelson had warned Marshall, Nelson testified:

"A. I didn't see that because, you see, when Mr. Marshall fell I was running forward to help him, but

before I came to Mr. Marshall there was somebody else who helped him up. Maybe some of the crew of the barge, or someone else; I can't remember who it was."
(TR 90)

Marshall was not furnished with an unsafe means of disembarkation. He was injured because he refused to heed the warning given by crewman Nelson. In spite of appellant's repeated argument (Op. Br. 4, 21, 29 to 46) that he did not hear the warning there is sufficient evidence that he must have heard the warning and ignored it. The Trial Court made the finding that appellant disregarded Nelson's warning and this finding is entitled to a presumption of correctness which has not been overcome by appellant's mere restatement of the evidence.

4. CAPTAIN'S SILENCE NOT AN ORDER FOR MARSHALL TO JUMP; CREWMAN'S WARNING SUFFICIENT.

Appellant does not consider the findings as a whole, but attempts to single out a finding here and there and then draw inferences which are without support in the record. For instance, after referring to the movement of the barge in the swell appellant tries to show that Marshall was actually "obliged to jump" because the Captain did not personally warn him, or did not go down to assist him. (Op. Br. 16-18). The fact that Marshall was warned by one of the crewmen of the vessel and that the crewman was available on the barge to assist Marshall if necessary is disregarded by appellant (Op. Br. 18-21) who complains that the Captain personally failed to take such steps. Appellant seems to feel that the Captain alone should serve his needs and that anyone else, particularly a crewman could not perform any duties for the vessel. In this manner appellant

works around to the unfounded conclusion that upon hearing the crewman's warning not to jump he could assume that the Captain directed him to ignore the warning. By the same devious reasoning and by relying upon his own testimony (Op. Br. 24-28) appellant reaches the conclusion that the Captain in effect actually *directed* him to jump to the barge at that moment.

Entirely irrespective of what the Captain did, or did not do, we must here point out that although the Captain was made a party he was never served with process, even though he appeared at a deposition taken in San Francisco long before the trial. At the trial the Captain was dismissed as a party. Thus appellant at the trial and in his present appeal complains only of appellee Steamship owner. A steamship owner's duties, however, toward passengers are performed by the entire ship's company and not just the Captain. Therefore to conclude as appellant has done that appellee is at fault because the Captain did not personally warn Marshall is to overlook the warning that was given Marshall by the crewman Nelson, employed by appellee shipowner.

C. Appellant's Admission of Fault.

Prior to the trial, Captain Sellevald had testified by deposition that Marshall told him the accident was Marshall's own fault and that it "had nothing to do with you" (SD 11).

Prior to the trial Kaldefoss testified by deposition that Marshall had admitted to him it was his own fault and that Marshall had said "I thought I was younger than I am" (KD 13).

At the trial Marshall also admitted he told the Captain "I feel it was my fault" (TR 74). He also admitted having

said he found he was not quite as young as he thought he was (TR 75). He made the same statements to the Chief Officer Kaldefoss (TR 75). He made no complaints of the method used to disembark or of the location or condition of the barge or of the position or condition of the gangway (SD 11-12 and KD 13). He had these conversations with the Captain and Chief Officer either that night—the night of the day on which the accident occurred—or the next morning (TR 75). He was quite frank in confessing to his admissions. He claims, however, that he was trying to be kind to the Captain, and that when he confessed to his fault he did not know the extent of the injuries (TR 74). The evidence is to the contrary.

Appellant testified to the following nature of his injuries before he returned to the vessel from Valdivia and before these admissions of fault were made:

His knee kept getting bigger and bigger—about the size of a large cauliflower (TR 49). At Valdivia he could not walk. He was taken to the hospital. There were two doctors—one a surgeon (TR 49). He was x-rayed and blood taken from the knee (aspirated). His leg was placed in a cast (TR 49). He was taken to the hotel at Valdivia in an ambulance (TR 50). He was taken back to the river boat in an automobile. He had to be helped a great deal because of the cast (TR 50). He was later carried aboard the vessel because he could not walk up the gangway (TR 50). He then went to bed (TR 50). It was after all of this that he still made the admission of his fault—and that it had nothing to do with the Captain.

This was not an attempt to get an admission against interest for purposes of a law suit, but merely a voluntary admission after appellant had had time to think about the accident. The facts of the case make it clear that Marshall

was referring to the circumstances showing it was his own fault; that he should not have jumped; that he should have heeded the warning and that he should have requested assistance if he were going to jump at that time. The admission is therefore very significant.

The circumstances of the admission in *The Ocracoke*, 159 Fed. 522, cited by appellant are entirely different than in this case.

An admission of appellant's fault, coupled with facts which preclude liability of appellee strongly supports the conclusion there was no liability (Op. Br. 49).

There was no objection by appellant to the introduction of such testimony and he must therefore have admitted relevancy. It was evidence of liability, not impeachment. It is now too late to claim it is of no effect. In *Gulzoni v. Tyler*, 64 Cal. 334 (1883) the court stated at page 336:

"The evidence of what the Plaintiff said when asked whether he blamed anybody on the boat should not have been stricken out. Evidence of what he said in regard to the occurrence was admissible for the defense. If he expressed an opinion as who was to blame, the Defendants were entitled to have the benefit of it."

Appellant cites authority which he says makes his admission of fault insufficient where appellee is liable as a matter of law. Again appellant is trying to make the appellee an insurer of the passengers' safety by contending that the mere happening of an accident imposes liability.

D. Sole Fault.

This is not a case for the application of comparative negligence doctrines. The Court has found—a finding fully supported by the evidence—that the proximate cause of

appellant's injuries was solely his own negligence. Therefore appellant is not entitled to recover any damages.

E. Damages.

The discussion of damages is inappropriate since damages do not create liability regardless of the sympathies involved.

IV.

CONCLUSION

Appellee respectfully submits that the evidence supports the District Court in its findings of fact and conclusions of law, that there is no law nor legal principle requiring any result other than that already found, that appellee maintained a safe vessel, provided a safe gangway, and landing facilities, gave warning to Marshall in the instant case, and had assistance available if necessary. Appellant has failed to overcome the presumption of the validity of the District Court conclusions and has not established error. Appellee prays that this appeal be dismissed and the decree below affirmed.

Respectfully submitted,

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No. 15,611

United States Court of Appeals
For the Ninth Circuit

HARRY L. MARSHALL, JR.,

Appellant,

VS.

WESTFAL-LARSEN & Co., GENERAL
STEAMSHIP COMPANY and BJARNE
SELLEVOLD,

Appellees.

APPELLANT'S OPENING BRIEF.

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Appellees.

APPELLANT'S OPENING BRIEF.

I. JURISDICTION.

Since this is a suit in admiralty by libellant, who was a passenger on respondent's vessel, to recover damages for injuries which were suffered by him while disembarking from the vessel and which were caused by respondent's negligence, the District Court had jurisdiction. U.S. Const. 3, Sec. 2, Cl. 1; 28 U.S.C.A., Sec. 1333; *The Admiral Peoples*, 295 U.S. 649, 55 S.Ct. 885; 2 C.J.S. Admiralty, Sec. 3, p. 64; Sec. 59, p. 114; and Sec. 62, pp. 121-123.

The libel "in a cause of contract and damage, civil and maritime" (R 3) alleges the facts stated in the next preceding paragraph and then alleges that "the

matters herein alleged are within the admiralty and maritime jurisdiction of the United States and this Honorable Court'' (R 5); and respondent by its answer admits this allegation. (R 8.)

This court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 1292.

II. BRIEF STATEMENT OF THE CASE.

Libelant, Marshall, a man sixty-one years of age, as a passenger, boarded respondent's vessel, Hardanger, at Los Angeles on December 28, 1954 for a voyage down the west coast of South America, through the Straits of Magellan and up the east coast. He was injured on February 1, 1955, while disembarking at Corral, Chile. The ship had stopped at nine places on the west coast of South America before it arrived at Corral, and when it did its passengers would go ashore for sightseeing. At many of these stops the ship did not tie up to a pier, but anchored in the harbor; and the passengers would go ashore in a shore boat, being helped into the boat by an officer or member of the crew standing on the lower platform of the gangway and by the man in charge of the boat.

When the ship arrived at Corral it did not tie up to a pier, but anchored in the harbor. It was arranged between Marshall and the master of the ship, Sellevold, that they would go ashore together early in the morning of February 1. On that morning the gang-

way was rigged along the side of the ship. The lower platform of the gangway was about two to three feet above the deck of an empty barge which was being moved up and down two to three feet by the swell of the sea. The captain in effect directed Marshall to disembark by jumping unassisted from the lower platform of the gangway to the barge and by then walking across the barge to a shore boat on its other side. The captain went down the gangway behind Marshall. He did not jump down to the gangway before Marshall so that he could assist Marshall in descending; and although it had been the ship's practice to provide assistance to passengers disembarking from the vessel when anchored in a harbor, he took no steps to provide such assistance.

The barge was one hundred feet long and the lower platform of the gangway was opposite the forward end of the barge. When Marshall jumped, Nelson, a seaman, and Nordfonn, a deck boy, were on the barge, scraping and painting the ship. The respondent's witnesses contradicted one another as to where these men were on the barge, but their testimony, when considered together, establishes beyond any doubt that they were on the after end of the barge and that while Marshall and the captain were descending the gangway, Nordfonn was pulling on the rope that tied the after end of the barge to the ship, in order to bring the barge nearer the ship's side. The captain did not direct these men to assist Marshall; but when Marshall was about to jump, Nelson called to him not to jump. (The ironical fact is that a seaman, who had no duty

whatever with regard to Marshall's safety was seeking to safeguard him, whereas the captain, who was charged with the highest duty to protect him from harm, not only did nothing to safeguard him, but tacitly directed him to take the jump.) Marshall testified that he did not hear Nelson's warning; that if he had heard Nelson he would have asked the Captain, who was behind him, what to do; but that when he reached the lower platform of the gangway, he waited a moment for whatever directions the captain might want to give him; and that when the captain said nothing, he jumped and was pitched by the movement of the barge and, to save himself from being thrown down the empty forward hold of the barge, turned sharply injuring his knee severely.

The trial court found that (1) respondent did not fail "to furnish" Marshall with a safe means of disembarkment; (2) that respondent did not fail "to take reasonable means to safeguard" Marshall "while he was disembarking"; (3) that respondents did not fail to "provide sufficient officers and employees to superintend his disembarking"; (4) that Marshall's injuries were in no way caused "by any negligent act or omission of respondent, the Master or crew"; (5) that Marshall in disembarking had failed to exercise reasonable care and that the proximate cause of his injury was his own negligence; and (6) that Marshall is not entitled to recover any damages from respondent. (R 15-17.)

Some of these findings are found in the court's "Findings of Fact" and others in its "Conclusions of

Law." We shall, for convenience, refer to them all as "the court's conclusions."

The court also found that Marshall, in jumping from the lower platform of the gangway, disregarded Nelson's warning. (R 14.)

III. SPECIFICATIONS OF ERRORS.

Both the court's findings of specific facts and the facts established by the uncontradicted testimony show that its conclusions are clearly erroneous.

Both these findings and such testimony show that respondent failed (1) to furnish Marshall with a safe means of disembarking; (2) to take reasonable measures to safeguard Marshall while he was disembarking; (3) to supply sufficient officers and employees to superintend his disembarking; (4) that Marshall's injuries were caused by these negligent acts of respondent and its master; and (5) that Marshall did exercise reasonable care.

(6) Marshall's statement that he did not hear Nelson's warning is supported by the great weight of evidence and should be accepted as true; and therefore the court's finding that he disregarded the warning is clearly erroneous.

(7) But assuming for argument's sake that Marshall was negligent, he, under the admiralty doctrine of comparative negligence applicable to the case, is nevertheless entitled to recover not all of his damages, but the balance remaining after the amount al-

lowable to his fault shall have been deducted; and so the court's conclusion and judgment that he is not entitled to recover any damages is clearly erroneous.

IV. ARGUMENT.

- A. THE LEGAL PRINCIPLES APPLICABLE TO THE CASE: RESPONDENT WAS UNDER A DUTY TO SUPPLY MARSHALL WITH A REASONABLY SAFE MEANS OF DISEMBARKING FROM THE SHIP; AND BOTH IT AND ITS MASTER, IN PERFORMING THIS DUTY, WERE OBLIGED TO EXERCISE THE HIGHEST DEGREE OF CARE.

There is no dispute about these principles; and so we need not dwell on them at any length.

In *Moore v. American Scantic Line*, 2 Cir., 121 F. 2d 767, a passenger of a steamer sued to recover damages for personal injuries sustained by him when he, while jumping rope on deck, stepped on an uneven portion of the deck and fell and hurt himself. The court said that although a carrier is not an insurer of the safety of its passengers, it does owe them "the duty to exercise a very high degree of care" for their safety; and a passenger is "entitled to have a carrier exercise for his safety as much skill, care, and prudence as an exceedingly competent and cautious man would bring to the task in like circumstances . . ."

The *Moore* case cites a leading case, *Pennsylvania Company v. Roy*, 102 U.S. 451, in which a passenger on a railroad was injured when an upper berth fell on and injured him. In the *Pennsylvania* case the court said:

“ . . . The carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men.”

In *Voltmann v. United Fruit Co.*, 2 Cir., 147 F. 2d 514, where a passenger on a steamer was injured by the slipping of furniture in the lounge during a storm, the court said:

“It was the duty of the master to protect him from harm with the care, skill and prudence which an ‘exceedingly competent and cautious man would bring to the task in like circumstances’.”

There are many cases stating and applying these principles. See also *The City of Panama*, 101 U.S. 453, 462-463; *Maibrunn v. Hamburg-American S.S. Co.*, 2 Cir., 77 F. 2d 304; *The Thessaloniki*, 2 Cir., 267 F. 67, certiorari denied 254 U.S. 649, 41 S. Ct. 63; *Kvart v. Swedish American Line*, 2 Cir., 126 F. 2d 279.

Another principle applicable to this case is stated in 80 C.J.S. 1118-1119, sec. 193c of Shipping, as follows:

“It is the duty of a carrier of passengers by water to maintain at all proper times, a reasonably safe means for passengers to get on and off the vessel employed, and to provide employees to render such services as are necessary to get passengers safely aboard or on shore.”

The carrier, as stated by this textwriter, must do two things: (1) it must provide a reasonably safe

means for passengers to get on and off the vessel; and (2) it must render such services as are necessary to get passengers safely aboard or on shore.

In *Burrows v. Lownsdale*, 9 Cir., 133 F. 250, the passenger, either from dizziness, or from the slipping of his foot, fell from a gangplank leading from the steamer to the dock. The plank was 10 feet long, 16 inches wide and 1 inch thick and had no railing, ropes or guards of any kind and was at an angle of about 30 degrees. The court said:

“ . . . Such a plank as that described, extending over the water at such an angle, without railing, ropes, or guards, is not a reasonably safe means of passage for man, woman, or child, of whatever age. The law made it the duty of the carrier to provide a reasonably safe means for discharging its passengers, and the failure of appellants in that regard in the instance in question rendered them clearly liable in damages.”

In *Mawson v. Eagle Harbor Transportation Co.*, 148 Wash. 258, 268 Pac. 595, a case in which the facts were practically the same as those in the *Burrows* case, the court said:

“ . . . The use of a gangplank constructed as this was can hardly be said to be the exercise of that high degree of care to provide a reasonably safe means of ingress and egress which a public carrier owes to its passengers for hire. It surely requires no argument to establish the fact that an unguarded plank, set at an angle of 30 degrees, one end resting on the dock and the other on the

ship and the use of which requires a passenger to walk down the incline and assume a stooping position to get upon the boat, is decidedly an unsafe method to present to the public for its use."

These two cases (the *Burrows* and the *Mawson* cases) are clearly analogous to the case at bar. It should make no difference whether the means provided by a ship to enable a passenger to disembark consists of walking a plank at an angle, and without ropes, or jumping two or three feet from the lower platform of a gangway onto a barge which is being moved up and down two or three feet by the swell of the sea and which is, therefore, a most unstable platform, capable, as shown by the facts in this case, of pitching a man jumping on it and thus causing him to fall. It requires no argument to show that such a jump is just as unsafe a method of getting off a ship as walking planks like those used in the *Burrows* and *Mawson* cases. And when a ship in effect directs a passenger to use such a method of disembarking it is not exercising that high degree of care to protect him from harm which the law imposes on it; on the contrary it is grossly negligent.

In *The Ocracoke*, 159 Fed. 552 (D.C. Va.), a passenger saw four other passengers get off a ship which was in the act of landing at a wharf, by stepping from the ship onto the wharf without waiting for a gang-board to be put out. On being advised that a gang-board was not to be put out, he also stepped off, but lost his balance and was thrown from the wharf and seriously injured. The court, in holding the respond-

ent liable and that appellant was not guilty of any contributory negligence, said, at page 554:

“The conclusion reached by the court upon this whole evidence is that the libelant is entitled to recover for the injuries sustained; that as a passenger upon this steamer, he had the right to assume under the circumstances that this was the place of landing at Newport News; and that the respondent utterly failed to take due and proper care to provide for the passenger landing from the steamer, by the employment of proper employees to render such services, either in the matter of informing passengers as to the place of landing or making a safe landing, and, on the contrary, by the course of conduct of its employees, and the sole representative that was then engaged in the double purpose of making fast the ship and landing passengers *invited and caused the libelant to alight* [italics ours] as other passengers had done immediately preceding.”

The proposition held by this court, therefore, is that where a vessel furnishes a passenger a means of disembarking, it in effect invites or directs the passenger to use it; and the passenger is not guilty of negligence in using it, even though it may not be safe. This proposition, which is certainly apposite in this case, is implied but not explicitly stated in the *Burrows* and *Mawson* cases; in *The Ocracoke* it is stated explicitly.

When a passenger is furnished a means of disembarking, he is not under any duty to order other or better means, or to order assistance in their use.

But the obligation to furnish safe means and assistance rests on the vessel; and it, and particularly its master, should perform these duties with the high degree of care the law imposes on it; that is, it should perform them with the "skill, care and prudence" which "an exceedingly competent and cautious man would bring to the task."

It is not the law—it simply cannot be the law—that a vessel may furnish a passenger with an unsafe means of disembarking and then maintain that his use of it was negligent. Such a rule would completely abrogate the salutary principle that a vessel must exercise the highest degree of care to protect its passengers from harm.

B. THE FINDINGS THEMSELVES DO NOT SUPPORT THE JUDGMENT BUT SHOW THAT RESPONDENT IS LIABLE TO MARSHALL.

The findings contain only a partial and abridged statement of the facts; and so we should first state certain undisputed and preliminary facts established by the evidence, but not stated in the findings, so that the facts actually found by the court shall appear in their true setting.

The facts we will state in this paragraph are established by Marshall's testimony. They are uncontradicted. Marshall boarded the steamship Hardanger, a freighter able to carry twelve passengers (R 42), at Los Angeles on December 18, 1954, for a voyage down the west coast of South America through the

Straits of Magellan and back the east coast. (R. 36.) The steamer arrived at Corral, Chile, where the accident occurred, on January 29, 1955, and stayed there until February 3, 1955. (R. 26, 51.) (Since all the dates to which we shall refer hereafter occurred in 1955, we in stating a date shall not refer to the year.) Prior to arriving at Corral, the steamer stopped for periods of from one to four days at nine South American ports. Corral was its tenth stop. (R. 37.) It did not dock at a pier at seven of these ten ports, but anchored in the harbor. (R 52-54; 63-64.) When the ship would arrive at one of these ports, normally six or eight passengers would go ashore for sight seeing (R. 53-54; 64); but sometimes only one or two would go ashore. (R 67.) When the ship was not tied up to a pier, but was anchored in a harbor, the ship would make arrangements for a shore boat to come out to it to take the passengers ashore. (R 53-54.) The shore boat which took Marshall ashore at Corral on the morning of the accident tied up to a barge which lay alongside the ship. On those occasions on which passengers went ashore prior to the arrival of the steamer at Corral, the shore boat which took them ashore would not tie up to a barge as it did at Corral on the morning of the accident, but the passengers went directly from the gangway into the shore boat. (R 53-54.) On these prior occasions, an officer, or a seaman, of the ship would be on the lower platform of the gangway to help the passengers from the lower platform into the shore boat and the man in charge of the boat would be there to take hold of a passenger

as he left the lower platform and help him into the boat. (R 54-55.)

(Three of respondent's witnesses, the first officer, Kaldefoss, the Captain Sellevold, and Nordfonn, who at the time of the accident was a deck boy, testified by depositions which were read and then admitted in evidence as respondent's exhibits B, C and E respectively (R. 102, 116). We shall cite the testimony of each of these witnesses by giving the initial of his surname followed by the letter D; for example, we shall cite the testimony of Kaldefoss by the initials KD.)

Kaldefoss testified that when the ship was not tied up to a pier, but was anchored in a harbor, and passengers were leaving it to go ashore, the usual practice was for somebody from the ship to help passengers from the lower platform of the gangway to the shore boat. (KD 27.)

When the steamer stopped at Corral on January 29th, she did not dock at a pier, but anchored in the harbor. (R 38.)

On the evening of January 31st, Marshall had a conversation with the captain of the vessel, Sellevold, in which the captain told Marshall that early the next morning he was going from Corral up the Valdivia River about eight or ten miles to see an agent of his company. Marshall then indicated that he might like to go with the captain on the trip; and the captain invited him to go; and it was then arranged that they should have an early breakfast together at 7 o'clock

on the following morning and would then go ashore. (R 38-39.)

Pursuant to this arrangement, Marshall and the captain breakfasted together on the morning of February 1st. Marshall then told the captain that he would meet him on deck and went to his cabin for a few minutes. When he arrived on deck about 7:30 in the morning, he found the captain talking to the first officer, Kaldefoss, at the head of the gangway. (R 40.)

At the time of the accident Marshall was sixty-one years of age (R 56); and at that time the captain knew Marshall's age. (R 56; SD 21-22.)

Having stated these preliminary and undisputed facts, we can now quote the statement of specific facts contained in the findings which, as we have stated, do not support, but on the contrary, contradict, the conclusions which the court drew from them.

The court found:

“ . . . During the early morning of said day [February 1] Libelant and the Master, Bjarne Sellevold, left said vessel to go ashore via a small tug. At the time of disembarking the gangway of said vessel was so rigged as to permit access to a barge on the portside of said vessel. In order to reach the shore tug it was necessary to descend said gangway to the barge and cross the barge to the tug.

“At the time the weather was clear and dry. There was a swell to the sea and therefore the barge was moving up and down under said gangway from two to three feet. Libelant was aware of these conditions.

“As Libelant descended the gangway the Captain was behind him. Mr. Nordfonn and Mr. Nilsen, two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel. Assistance was available to Libelant in reaching the barge, if he wished it. When Libelant reached the lower platform of said gangway Mr. Nilsen called to him ‘Don’t jump.’ Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest.

“Libelant jumped at right angles to the vessel and in a direction across the barge, but when he landed he was at an angle somewhat facing the hold. He was then pitched by the movement of the barge to his left. Libelant in order to avoid being thrown down the forward hold of the barge turned sharply twisting his left knee and sustained injuries to his left knee consisting of a tear of the anterior cruciate ligament. He proceeded across the barge to the tug with the Captain and went ashore where he received medical attention. Libelant then returned to the vessel.”
(R 14-15.)

On the basis of these findings (which we have called the findings of specific facts) the court concluded (1) that respondent had performed its duty (a duty which it was required to perform with the highest degree of care) to furnish Marshall with a safe means of disembarking, to safeguard him while disembarking, and to provide efficient and careful men to supervise his disembarking, and (2) that the sole cause of Marshall’s injuries was his own negligence.

1. Our first point under this head is that the findings of specific facts themselves show that respondent did not perform this duty; that is, they show that respondent did not furnish Marshall with a safe means of disembarking and did not safeguard him while disembarking and provide efficient and careful men to supervise his disembarking; and so these findings themselves, without the aid of any evidence, deny the court's conclusion that respondent performed this duty.

The court found that it was necessary for Marshall, in order to disembark, "to descend the gangway to the barge and cross the barge to the tug." It did not find how far the lower platform of the gangway was above the deck of the barge; in other words, it did not find how far Marshall was obliged to jump to get from the lower platform to the barge. We shall have to look to the evidence to supply this fact. But it did find that "There was a swell to the sea and therefore the barge was moving up and down under the gangway from two to three feet," and also that when Marshall landed on the barge, "he was then pitched" by its "movement to the left," and that he "in order to avoid being thrown down the forward hold of the barge turned sharply twisting" and injuring his knee. The court, therefore, found that Marshall was obliged to jump from the lower platform of the gangway to a barge being moved up and down by the sea two to three feet and that he was pitched by the movement of the barge and injured.

A barge being moved about by the sea in this manner is a very unstable platform on which to jump. It can pitch and throw down a man (particularly a man who is not experienced in the ways of the sea) who jumps onto it; and as found by the court, it did pitch and injure Marshall. It might, as implied by the court's findings, have pitched him down the forward hold of the barge and severely injured or killed him.

When, therefore, the court found that respondent furnished Marshall this means of disembarking, it found in effect, positively and definitely, that respondent had not furnished Marshall with a safe means of disembarking.

The next question, therefore, is what do the findings show with respect to the measures taken by respondent to safeguard Marshall while he was disembarking and to provide efficient and careful officers and men to superintend his disembarking.

The court found that "as Libelant descended the gangway, the captain was behind him"; and also that "Mr. Nordfonn and Mr. Nilsen (sic), two seamen, from the vessel were on the barge engaged in scraping and painting the side of the vessel;" and that "Assistance was available to Libelant in reaching the barge, if he wished it."

It did not find that the captain got down onto the barge before Marshall jumped to assist Marshall in descending; or that he ordered Nelson and Nordfonn

to so assist Marshall; or that he took any steps whatever to safeguard Marshall. We can, therefore, infer from the findings that the respondent did none of these things; and as we will later show, the evidence shows without contradiction that respondent did none of them.

All that the court found that has a bearing on this point is that "Assistance was available to Libelant if he had wished it." The question is not what Marshall wished; but whether respondent performed its duty of safeguarding him, when he made his jump which proved to be dangerous, by providing competent men to assist him in getting onto the barge. The findings show that respondent completely neglected to perform this duty.

And so the court's findings of the facts themselves, without any reference to the evidence, show that respondent did not furnish Marshall with a safe means of disembarking and with competent assistance in disembarking; and so these findings negate its conclusion that respondent performed these duties.

2. This brings us to our second point under this head, that is, to the question whether the facts found by the court support its conclusion that the sole cause of Marshall's injuries was his own negligence.

Our first answer to this question is that the findings which we have already reviewed demonstrate that respondent did not perform its duty which we have just been considering, and that such failure, if not the sole cause, was certainly a contributing cause of Marshall's

injuries; and so the facts as found by the court negate definitely and positively the court's conclusion that Marshall's alleged negligence was the sole cause of his injuries.

Since the admiralty doctrine of comparative negligence applies to the case and since as shown by the findings respondent's negligence contributed to Marshall's injuries, Marshall was entitled to recover at least a portion of his damages. We shall discuss this point later. The question here is what did the court find to support its conclusion that Marshall did not exercise reasonable care.

In this connection, we wish first to point out that Marshall had the right to disembark by the means which the vessel supplied him. As the court found, the captain was directly behind him as he descended the gangway. The captain was in effect directing Marshall to use the means which Marshall did use to disembark. Marshall, therefore, cannot be charged with negligence because he used such means. He could not issue orders; he could not order the captain to furnish him with a safe way of getting off the ship and with assistance in getting off.

It will be recalled that in the *Burrows* case (supra) the gangway consisted of a plank 10 feet long and 16 inches wide; that it had no railing, ropes or guards of any kind and was at an angle of about 30 degrees; and that the gangway in the *Mawson* case (supra) was practically the same. It will also be recalled that in *The Ocracoke* (supra) the passenger was injured by attempting to step, without a gangplank, directly from

the deck of the ship to the wharf when the ship was landing; and that in *The Ocracoke* the court pointed out that the ship had in effect "invited and caused" the passenger to try to get ashore in the way he used. The means of disembarking employed by the passengers in these cases were obviously not safe; but the passengers who were injured in using them were under no obligation to call on the vessel to supply better and safer means; but they had the right to use the means supplied them and could not be held guilty of negligence in using them. The same is true of Marshall; more true of Marshall than of the passengers in these cases because he was in effect acting at the direction of the captain who was the master of the ship and was charged with a special duty to protect him.

It would be a strange rule of law that would permit a ship (which is charged with the highest duty of care to protect its passengers from injury) to furnish its passengers with an unsafe means of embarking and disembarking and then to permit it to say to a passenger injured in using such means "It is true you were hurt in using the means supplied you to disembark, but you should have seen that these means were unsafe and so you can recover nothing for your injuries."

The court found that Marshall "was aware of these conditions"; that is, he was aware of the fact that, as found by the court, the barge was being moved by the swell of the sea "up and down under the gangway from two to three feet." Certainly he was aware of them. But he was not a seagoing man; and as we

shall point out later, he did not know how a barge being moved about by the sea could pitch a man. But the captain, who was directly behind Marshall, was aware of these conditions also; and being a seafaring man, he knew that the moving barge could pitch Marshall and injure him. But he did nothing, absolutely nothing, to safeguard Marshall.

The court found: "When Libelant reached the lower platform of said gangway Mr. Nilsen (sic) called to him 'don't jump.' Libelant disregarded said warning and jumped from the gangway platform to the barge, while said barge was rising on a swell and before it had reached its crest."

Marshall testified that he did not hear Nelson call this to him. We shall carefully review later the evidence bearing on the point in order to establish that the great weight of the evidence shows that the trial court should have believed Marshall and that, therefore, the court's finding that he ignored Nelson's warning is clearly erroneous.

But at this place we should say this respecting Nelson's warning. In the first place, assuming for argument's sake that Marshall heard it, the captain, who was behind Marshall, must have heard it also; and since the captain did not tell Marshall not to jump, Marshall, if he had heard the warning, would have had a right to assume that the captain was tacitly directing him to ignore it.

The second point relating to Nelson's warning which we believe we should mention here is this. As found by the court, Nelson was a seaman, who was on the

barge to scrape and paint the vessel. He owed no duty to protect Marshall; but he believed that it was so unsafe for Marshall to jump that he called to Marshall not to do so. If an ordinary seaman, who had no duty whatever with respect to Marshall, believed that it was not safe for him to make the jump, certainly the captain should have believed the same thing and should not have permitted Marshall to jump at least until either he or someone else was on the barge to assist Marshall in descending. Could anything make more clear how negligent, how grossly negligent, the captain was in the performance of the duty which the law imposed upon him to exercise the "skill, care and prudence" which "an exceedingly competent and cautious man" would have exercised to protect Marshall from harm?

We can conclude our argument under this head by saying that the court's findings themselves, without the aid of any evidence, demonstrate that respondent violated in a gross manner the duties it owed Marshall and that it should have been held liable for doing so.

C. THE EVIDENCE CONFIRMS WHAT IS SHOWN BY THE SPECIFIC FINDINGS OF THE COURT, THAT IS, THAT RESPONDENT VIOLATED THE DUTIES IT OWED MARSHALL AND SHOULD BE HELD LIABLE TO HIM.

In reviewing the testimony, let us follow the same method we used in considering the findings; let us first review the testimony confirming what is shown by the findings; that is, that respondent did not furnish Marshall with a safe means of disembarking and

did not protect him while he was disembarking by providing competent men to assist him in getting onto the barge; and then let us review the testimony bearing on the question whether Marshall himself failed to use reasonable care.

1. The uncontradicted evidence shows that respondent did not furnish Marshall with a safe means of disembarking and with assistance in disembarking.

As we have already pointed out, the record shows that when Marshall, pursuant to his arrangement with the captain, came out on deck at about 7:30 on the morning of February 1st, he found the captain and Kaldefoss, the first officer, together at the head of the gangway; that he then descended the gangway; and that the captain descended it behind him.

Kaldefoss testified:

“Q. Now, Mr. Kaldefoss, it is a fact, is it not, that when the gangplank is lowered onto a barge, as this gangplank was, the lower platform of the gangplank is always maintained rather high off the barge so that if there is a swell the sea will not raise the barge and strike the gangplank? That is correct, isn't it?

A. Yes.

Q. And so when this gangplank was lowered, it was lowered to such a position that it would be some distance or some height above the deck of the barge, so that the barge, when struck by a swell, would not strike the gangplank?

A. Yes.” (KD 21.)

Kaldefoss also said that when Marshall descended the gangway, the lower platform of the gangway was about two or three feet above the deck of the barge

and that the barge was about a foot from the side of the ship (KD 10); and that at that time there were two men on the barge painting and scraping the ship, Nelson, an ordinary seaman, and Nordfonn, a deck boy (KD 12).

Kaldefoss also testified:

“Q. Now, when you saw Mr. Marshall step onto the upper platform to go down the gangplank, did you say anything to the men from the ship working on the barge, telling them that a passenger was descending, and asking them to look after his descent from the lower platform to the deck of the barge?

A. No.

Q. Did the captain do anything of that sort?

A. No.” (KD 22.)

Marshall testified that the captain followed him down the steps of the gangway; that when he reached the lower platform of the gangway, the platform was two or three feet above the deck of the barge; that at that time there was a swell in the sea which was moving the empty barge up and down under the gangway from two to three feet (R 43-44); that when he reached the lower platform of the gangway, the captain said nothing to him and nothing was done to lower the gangway so that it would be nearer the deck of the barge (R 44); and that there was nobody from the ship on the barge to help him descend from the platform to the barge (R 50-51). He then testified:

“Q. Now, you stood there on the lower platform of the gangplank in the position you have described, and what did you do then?

A. Well, I looked at the barge, and sort of subconsciously I wondered if the Captain was going to say anything. Nothing was said, so I assumed I was to jump, and I jumped and he jumped after me.” (R 45.)

Later on he testified on cross-examination (we quote somewhat at length because of the importance of the testimony) :

“Q. How far away was the Captain from you when you jumped?

A. I would say two to three steps up the gangplank.

Q. Two to three steps? Did you inquire of him or make any statement to him how you were expected to get off onto the barge?

A. No. I tarried a few seconds on the lower platform. The Captain was two or three steps behind me and no orders were given.” (R 68.)

“Q. Now, when you came down the gangway that morning to board the barge, did you expect there would be somebody there to help you off the gangway?

A. Well, I came down the gangplank with the Captain, and I assumed that what we did would be with the approval of the Captain. If there wasn't anybody on the barge, I assumed he didn't want anybody on the barge. . . .

Mr. Gerhardt: All right. On page 21, line 25 [the reference is to Marshall's deposition] Mr. Marshall, I asked you, 'Now, did you expect there would be somebody at the end of the lower platform to assist you onto the barge?' And your answer was, 'That had always been customarily so, I mean on and off the ship there was always

somebody to help you when you went ashore, but I thought because of the earliness of the morning that one would have to accept the prevailing situation. There wasn't anybody there, and I thought because it was half past seven in the morning that they had failed to put somebody there.'

Is that right? Was that your answer?

A. Right." (R 66-67.)

"Q. Can you recall when you jumped whether the barge was on the way up on the swell or whether it was on the way down?

A. Well, that would be hard to recall exactly, but I think it was up-coming up.

Q. Coming up? And do you recall whether it had reached the peak of the swell?

A. No.

Q. It had not?

A. I do not recall that.

Q. What made you decide that that was the proper moment to jump?

A. Well, I had stood there a few seconds and it seemed to me it was a safe distance. *What I didn't understand or know is what a swell could do to you.*

Q. And in this particular instance—

A. (interposing): If there had been no swell, it would have been a safe jump.

Q. That is true, but you could see the swell, couldn't you?

A. Right." (R 71.)

Marshall then testified, as found in substance by the court, that he jumped from the lower platform at right angles to the ship and landed about a foot from the coaming rail of the forward hold of the barge. He

marked the place where he landed on the barge as "M-1" on exhibit 1 (the drawing to scale used at the trial, to which we shall refer later). (R 45-46.) He then testified:

"Q. When you made that jump and lit on the deck, what happened then?

A. Well, the instant I hit the deck I was pitched forward head down into the empty hold.

Q. You were pitched to your left?

A. Pitched to my left.

Q. By the movement of the barge?

A. That is correct.

Q. And what did you do then?

A. Well, I knew if I went down the hold I couldn't survive it, and I couldn't move my feet because the thing happened so fast, so I twisted my whole body to the right and in that way tore the ligaments out of my left leg." (R 46.)

He then went on to say that he fell on the deck of the barge on his hands and knees and got up immediately; that he did not know at that time that he had torn the ligaments of his knee; that he felt a dull pain, and rubbed his knee, but the acute pain came later when the blood collected in his knee (R 47); that after he picked himself up from the deck of the barge, he limped over to the little launch that was at the forward corner of the barge; that when he was there on the deck of the barge, or the shore boat, he could not remember which, the captain asked him if he was hurt and if he would like to go aboard the ship; that he replied that he did not know if he was hurt, but that as there was no doctor aboard, he believed he should go to Valdivia where there was a

doctor (R 47-48); that the captain and he went ashore in the small boat and took the ferry for Valdivia; that his knee kept getting bigger until it was the size of a large cauliflower; that when they got to Valdivia, he could not walk; that he was helped off the boat into an automobile and taken to a hospital where a surgeon aspirated the blood from his knee and put a cast on it; and that he and the captain then returned to the ship (R 49-50).

The facts established by this uncontradicted testimony are that the captain did not get down onto the barge before Marshall jumped to assist Marshall; that he did not order the two men on the barge to assist Marshall; that absolutely nothing was done to protect Marshall when he made the jump; that the captain in effect directed him to make it; that when Marshall jumped the two to three feet to the barge being moved up and down by the swell of the sea two or three feet, he was pitched by the movement of the barge and was obliged to turn sharply on his left leg to save himself from being thrown down the forward hold of the barge (which might have killed him) and in making this turn injured severely his knee; and that Marshall, not being a seagoing man, did not know "what a swell could do to" him, but the captain certainly did.

We need not repeat the arguments already made by us in considering the findings. It will suffice for us to say that the uncontradicted testimony confirms what the findings themselves show; that is, that the respondent and its master, not only did not exercise the "skill, care and prudence" which "an exceedingly

competent and cautious man" would have exercised to protect Marshall from harm, but that it and he were grossly negligent in failing to furnish Marshall with a safe means of disembarking and in failing to provide competent men to assist him to disembark.

2. The uncontradicted evidence shows that Marshall exercised reasonable care; and the weight of the evidence shows that Marshall did not hear Nelson's warning and that, therefore, the court's finding that he ignored this warning is clearly erroneous.

We shall not repeat here the argument we made in discussing the findings that Marshall, like the passengers in the *Burrows*, *Mawson* and *Ocracoke* cases, had a right to use the means of disembarking which the captain was in effect directing him to use and that he was not guilty of negligence in disembarking in this way.

The admiralty rule is that on appeal there is a trial de novo; but that the appellate court will usually accept the findings of the trial court unless such findings are clearly "against the weight or preponderance of the evidence." 2 C.J.S. on Admiralty, Sec. 187, pp. 318-319; and Sec. 192, pp. 326-327; *The Andrea F. Luckenbach*, 9 Cir., 78 F. 2d 827.

It is our contention that the clear weight or preponderance of the evidence shows that this court should accept Marshall's testimony that he did not hear Nelson call to him, and that the finding of the trial court that Marshall ignored Nelson's warning is against the weight of the evidence and is clearly erroneous.

Marshall testified on cross-examination:

“Q. And as you were coming down the gangway you were naturally facing in a direction which would take in practically all the entire length of the barge on the side nearest to the vessel, is that correct?

A. Not necessarily. I think when you are going down a gangplank you look at your feet, and when you get to the platform, if you are going to jump at right angles, you look at right angles.

Q. Had there been somebody working in there in this area within twelve to fifteen feet of the bottom of the platform, do you think you would have seen them?

A. If I were looking that way I would certainly have seen them, yes.

Q. As you walk down a gangplank do you watch your feet every second?

A. I certainly do.

Q. And when you got to the bottom of the platform didn't you look at the entire barge to see what its movement was?

A. No, I was looking at the holds and I was looking back to see if the Captain was coming, and I decided the only way I could get on the barge would be to jump at right angles because if I jumped ahead of me the passage was too narrow.

Q. And you saw no one there?

A. I saw no one there.

Q. Did you have any conversation with anyone on the barge?

A. I had no conversation with anybody on the barge because I saw no one.

Q. Did anybody on the barge speak to you?

A. No one that I heard.

Q. Did anyone on the barge give you a warning not to jump?

A. If they had, I wouldn't have jumped. I would have asked the Captain.

Q. Had that warning been given, you would have waited?

A. I would have asked the Captain then.

Q. Without that warning, was there any reason for you to go ahead and jump without asking the Captain?

A. Oh, I don't think a passenger need ask a Captain or order a Captain. I think when he was two steps behind me if he didn't want me to jump he would have said so, or he would have said, 'Let me go ahead.' " (R 68, 69-70.)

It should be noted that neither Kaldefoss nor the captain testified that he heard Nelson call to Marshall not to jump. Since respondent did not seek to elicit that testimony from either Kaldefoss or the captain, we can infer that neither of them (Kaldefoss was at the head of the gangway and the captain behind Marshall) heard Nelson call. Since neither of them heard Nelson, why should Marshall, who had his mind fixed on the task of getting onto the barge, have heard him?

The end of the barge towards the bow of the ship was referred to in the testimony as "the forward part of the barge" and the end of the barge towards the stern of the ship was referred to in the testimony as "the after part of the barge." We shall refer to them in the same way.

Kaldefoss, the first officer, testified that the barge was about 100 feet long (KD 7); that it was about twenty-five feet wide (KD 22); that it had three holds (KD 8); that the length of each hold was about twenty feet (KD 22-23); that the holds were empty (KD 16); that each hold was surrounded by a wall about two feet high called a "coaming" (KD 10); that it was less than five feet from the side of each of the holds to the side of the barge (KD 22); and that the lower platform of the gangway was about two feet square (KD 25).

When upon the taking of their depositions Kaldefoss, Captain Sellevold and Nordfonn testified a rough drawing prepared by Kaldefoss (KD 7) was used to illustrate their testimony which was marked on the trial "Defendant's Exhibit A for identification." We shall refer to it simply as "Exhibit A." Kaldefoss' rough drawing did not purport to be drawn to scale. It shows, for example, the gangway much longer in relation to the ship and the barge than it should have been shown; and it does not show correctly the relation of the forward hold on the barge to the lower platform of the gangway.

Marshall and Nelson both testified at the trial. Their testimony was illustrated by a drawing which was marked "Plaintiff's exhibit 1 for identification" and will be referred to simply as "Exhibit 1" and which was drawn to a scale of one eighth of an inch to a foot and shows properly the relation of the gangway to the ship and the barge and the position of the barge.

Nelson, who was twenty-four years of age at the time of the accident and was an ordinary seaman and who testified in part by an interpreter (R 80), testified that when Marshall was on the lower platform of the gangway, he was standing on the barge painting and scraping the ship (R 80-81). He indicated his place on the barge by placing his initials "J N" on Exhibit 1 (the drawing to scale which was used at the trial) (R 81-82). Applying the scale of this drawing, his testimony was that he was standing on the barge about twenty feet from the lower platform of the gangway towards the after part of the barge.

He said that when he saw Marshall, Nordfonn was on the barge working with him; that Nordfonn was within a meter or a half a meter from him. (A meter is 39½ inches.) He indicated Nordfonn's position on the barge on Exhibit 1 by marking it "JN-3", a place which was right alongside his position J N (R 95).

Nelson then testified that when Marshall was on the lower platform of the gangway, he called to him "Don't jump"; but that Marshall did not answer him, but jumped and fell; and that he then ran forward to help Marshall, but that before he reached Marshall somebody was there to help him up. (R 83, 90-91.)

It was the captain who jumped onto the barge after Marshall, but Nelson said on direct examination that he could not remember who the man was (R 83). When he was asked, not once, but at least twice, on cross examination, whether or not the man he saw with Marshall was the captain, he replied that he

could not remember (R 88-89, 92-93); which showed an amazing lack of memory.

As we will state later, the captain testified that when he and Marshall were going down the gangway to its lower platform, one of the men on the barge (whom he could not recall definitely, but believed to be Nordfonn) was pulling on the rope that tied the after part of the barge to the ship in order to bring the barge closer to the ship, and that when Marshall was picking himself up he hollered to this man not to pull on the rope any longer, because he was afraid that the lower part of the gangway would strike Marshall as the barge was being brought in under the platform.

Nelson said that although he could recall his exact position on the barge when Marshall was descending the gangway (R 99), he could not recall that the captain shouted to him or Nordfonn to stop pulling on the line (R 96-97).

Nelson's testimony, therefore, was that when Marshall was on the lower platform of the gangway, he was on the barge painting and scraping the ship about twenty feet from the lower platform of the gangway; that Nordfonn was working a meter or half a meter from him; and that when he called to Marshall, the latter did not answer.

It will be recalled that Kaldefoss testified that when Marshall descended the gangway Nelson and Nordfonn were on the barge scraping and painting the ship (KD 9-12). He then testified:

“Q. Where were they in reference to the lower platform when Mr. Marshall got onto the barge?

A. One here, *maybe*, and one here (indicating).” (KD 15.)

He then indicated on exhibit A (his rough drawing which was not to scale) that one of them was at “K3” and the other at “K4” (KD 15). He did not say which of them was at K3 and which of them was at K4. The lower platform of the gangway was about opposite the forward coaming of the forward hold. Marshall so testified (R 45); and the court so found (R 14-15). Applying the scale on which Exhibit 1 was drawn (one eighth of an inch to the foot), the lower platform of the gangway was, therefore, about ten feet from the prow of the barge. K3, the place at which Kaldefoss placed one of the men, was a little forward of the middle of the barge, about opposite the forward coaming of the middle hold of the barge. Since, as Kaldefoss testified, the barge was one hundred feet long and since K3 was a little forward of the middle of the barge, the man at this point (who must have been Nelson) was (if Kaldefoss’ vague indication of his position on the barge is accepted as evidence of where he stood) about forty-five feet from the prow of the barge, or about thirty-five feet from the lower platform of the gangway. K4, the place on Exhibit A at which Kaldefoss placed the other man was opposite a point a little aft of the forward coaming of the after hold of the barge and was about three-quarters of the distance back from the prow of

the barge, or about seventy-five feet from its prow, or about sixty-five feet from the lower platform.

Nordfonn, who testified by an interpreter (R 116) and who was a deck boy and eighteen years old at the time of the accident (ND 3), testified:

“Q. Now, at Corral, Chile, in February of 1955, did you see an accident to a passenger who was leaving the vessel?

A. Yes, not completely, but most of it.

Q. Where were you located at the time?

A. *I was on the after end of the barge.*”
(ND 3.)

Nordfonn gave his deposition on the same day as Kaldefoss and after the latter had testified and had said that “maybe” the two men were at K3 and K4 without stating which of the two men was at each of these places.

After Nordfonn testified that he at the time of the accident was on the “after end of the barge,” he said, in response to questions put to him by respondent’s counsel, that he was a little aft of K4. As just stated, K4 was about seventy-five feet from the prow of the barge, or about sixty-five feet from the lower platform. We can assume that when Nordfonn testified that he was a little aft of this point, he meant five to ten feet aft of it; and that therefore he placed himself on the after part of the barge about sixty-five to seventy-five feet from the platform. Nordfonn, after saying that he was a little aft of K4, testified:

“Q. Will you point to approximately where Mr. Nelson was located?

A. Right here.

Q. You are pointing to K-5?

A. *I can't say for sure, but it was somewhere in the vicinity where I put my finger.*" (ND 4.)

K5, the point on Exhibit A at which Nordfonn thus placed Nelson, was at about the middle of the barge about opposite the middle of the middle hold. Since the barge was one hundred feet long and since K5 was about at its middle, Nordfonn (by a designation which was as vague as that of Kaldefoss) placed Nelson about fifty feet from the prow of the barge, or about forty feet from the lower platform.

After Nordfonn had placed Nelson and himself on the barge, he testified that he saw Marshall come down the gangway (ND 5); that the captain was directly behind him (ND 10-11); and that neither the captain nor Kaldefoss spoke to either him or Nelson prior to the time Marshall jumped (ND 14). He also testified:

"Q. Did Mr. Nelson have any conversation with the passenger before he jumped?

A. As far as I remember, I think he said to him that he shouldn't jump.

Q. Did the passenger make any reply?

A. Yes sir. He said something. There was something said to the effect that it was O. K., and then he jumped." (ND 5.)

The contradictions in the testimony of respondent's witnesses became even more pronounced when we consider the captain's testimony.

The barge was made fast to the ship by lines from its forward and aft ends (KD 8-9).

The captain on his direct examination testified:

“Q. Were there any men on the barge besides Mr. Marshall?

A. The ordinary seaman Nelson and Nordfonn. The two of them.

Q. Where was Mr. Nelson on the barge?

A. *He was on the after end of the barge.*

Q. Where was Mr. Nordfonn?

A. *The two of them were back there.*” (SD 8.)

Then on cross-examination, he designated their place on the barge (he said it was their approximate position and that he could not be sure of it) at point “B” on Exhibit A, a point about opposite the after coaming of the after hold, or about ten to fifteen feet from the end of the barge. (SD 20.)

Later on cross-examination the captain testified:

“Q. Did you, at the time Mr. Marshall went down those stairs, did you know that there were two men from the ship on the barge?

A. Yes.

Q. Did you say anything to those two men on the barge?

A. Not as far as I can recollect.

Q. Now, Captain, there was—

A. Yes, I think I did. As far as I recall, one of them was putting his weight on the line. I think it was a little later. I said, ‘Don’t pull any more.’

Q. ‘Don’t pull any more’?

A. Yes.

Q. He was putting his weight on what line?

A. On the line from the barge to the deck there.

Q. While he was scraping, is that it?

A. He wasn't scraping then.

Q. What was he doing?

A. Well, so far as I can recall, he was just hanging on, putting his weight on the line so as to pull the barge in.

Q. Pull the barge in towards the ship?

A. Yes. . . .

A. I seem to recall when I hollered down not to pull any more that the gangway was over the deck, overlapping the deck of the barge. And that is why I asked him not pull any more.

Q. Where was the barge in relation to the ship?

A. Well, at the time I hollered, I seem to recollect that I hollered because it was getting under the gangplank. I mean under the platform, the lower platform of the gangway. So the gangway was overlapping the deck of the barge.

Q. That is, the lower platform of the gangway was partially over the deck of the barge at that time?

A. At the time I hollered.

Q. How much over, do you recall?

A. No. As far as I can recall, I hollered because I was worried about Mr. Marshall, that the gangway should touch him while he was down there.

Q. Were you worried about Mr. Marshall because the gangway might touch him? What do you mean by that?

A. I said it because I wanted to avoid that. . . .

A. Mr. Marshall was down by the hatch coaming there and the barge was coming in.

Q. In other words, Mr. Marshall was on the deck of the barge at the time you shouted?

A. On the deck of the barge or over the hatch coaming. I can't remember exactly what position he was in.

Q. He was either on the deck of the barge or he was over the coaming of the hatch?

A. Yes.

Q. And were you worried that the barge might come in from that point and strike his head against it, or his back or some part of his body against the outside of the lower platform of the gangway?

A. Yes. It was to avoid that that I hollered down, 'Don't pull any more.'

Q. Which man was pulling; was it Nelson or Nordfonn?

A. I'm not one hundred per cent sure, so I don't know.

Mr. Gerhardt. If you have a recollection, Captain, you can give it.

The Witness. Well, I would think it was Nordfonn. But I am not sure. . . .

Q. What was this man doing when he was pulling on the rope? Was he doing that to get the barge near the ship so he could scrape easier?

A. No. In my opinion it was to get the barge in so it was easier to get off the gangplank onto the barge.

Q. But the man had not been told that by you?

A. No.

Q. Or by the first officer?

A. Not to my knowledge. The way I recall it was that somebody started to pull the barge in as they saw us coming and got ready to come ashore.

Q. Because at that time the barge was out from the side of the ship?

A. That is the picture I have. I don't know if it was outside when Mr. Marshall jumped.

Q. You don't know where the barge was in relation to the side of the ship at the time Mr. Marshall jumped?

A. No." (SD 17-21.)

Now the captain could not have imagined and could not have been mistaken about incidents of this sort. They must have occurred just as he related them. And since they occurred, we must believe that when Marshall jumped Nelson was not where he placed himself, about twenty feet from the platform, but that he was on the after part of the barge, let us say about seventy-five feet from the platform at that time; that when Marshall and the captain were coming down the gangway, one of the men—the captain's best recollection was that it was Nordfonn—began pulling on the line from the after end of the barge to the ship to bring the barge in nearer to the ship; and that after Marshall had jumped and was standing on the deck of the barge, the captain hollered to the man who was pulling on the line to stop pulling because he was afraid that the lower platform of the gangway would strike Marshall as the barge was being brought in towards the side of the ship.

The sharp and material contradictions in the testimony of respondent's witnesses are obvious and extraordinary.

Nelson testified that he and Nordfonn were in the forward part of the barge; Nordfonn, Kaldefoss and the captain said that they were in its after part.

Nelson said that Nordfonn was right alongside of him, a meter or half a meter away. Nordfonn and Kaldefoss said that Nelson and Nordfonn were widely separated and the captain said that when he and Marshall were coming down the gangway one of them, he believed it was Nordfonn, was at the very end of the barge pulling on the line.

Nelson said that Marshall did not reply to his call; but Nordfonn said that Marshall did reply. If Marshall had replied the captain would have heard him; but since the captain did not testify that Marshall answered Nelson, the captain's testimony in effect corroborated Marshall in this respect. Since Nordfonn, according to the captain's best recollection, was the one pulling on the rope, he was about ninety feet from Marshall when the latter was on the lower platform of the gangway; and in any case he must have been at least sixty-five feet away; and so even if Marshall had replied (which he did not), Nordfonn would not have heard him. Since Nelson was the one who called and was the one nearer Marshall and since he spoke some English (he testified only in part by an interpreter, whereas Nordfonn gave all his testimony by an interpreter), his testimony that Marshall did not reply (corroborated as it is in effect by the captain) must be accepted.

Marshall was a truthful and accurate witness. As he was the one who had suffered the injury, his

memory of what happened was naturally more vivid than that of any of the other witnesses. His account of what took place, except whether he heard Nelson's warning, was not contradicted by any of the respondents' witnesses, on the contrary it was corroborated by respondents' witnesses. As will appear later, when he was asked whether he had admitted that the accident was his fault, he candidly replied that he had. He was not impeached in any way and he must be taken to be what he is, an honest and truthful man.

It is true that one cannot be definite in stating in feet the position of Nelson and Nordfonn on the barge as though one were actually measuring a distance to definitely established points; and that Kaldefoss, Nordfonn and the captain were each rather vague in indicating on Exhibit A the position of the men on the barge; but it is also true that each of them placed the men in the after part of the barge, and that the captain testified, in a circumstantial manner which we must believe, that one of them, Nordfonn he believed it was, was at the extreme end of the barge pulling on the line that tied the barge to the ship.

It is also true that the barge was one hundred feet long, and that it was established without contradiction by the evidence and so found by the court that the lower platform of the gangway was opposite that part of the forward end of the barge which was forward of the forward hold; that is, that it was about ten feet from the forward end of the barge.

Since the barge was one hundred feet long and since the lower platform was only about ten feet

from its forward end and since the men were in the after part of the barge, they must have been from about sixty-five to ninety feet from the lower platform, a very substantial distance.

The events leading to the accident took place in a brief space of time. When Marshall arrived on the lower platform of the gangway he tarried a few seconds to find out whether the captain, who was behind him, would give him any direction; but when the captain said nothing (tacitly directing him to jump), he did jump. He did not stop on the lower platform and look about him. He had his mind fixed on descending the gangway and making the difficult jump.

As we have stated, we must infer that neither Kaldefoss nor the captain heard Nelson's warning. Why then should Marshall whose attention must have been much more absorbed by what he was doing than that of either Kaldefoss or the captain?

Since the clear weight and preponderance of the evidence shows that Nelson and Nordfonn were on the after part of the barge, sixty-five to ninety feet from the lower platform, and since the events leading up to the accident occurred in a brief space and Marshall was necessarily concentrating on descending the gangway and making his jump, there was no ground for the court to reject his testimony that he did not hear Nelson's warning and to infer that he did.

Our first conclusion with respect to this phase of the case is the same as that stated by us in considering

the findings; that is that Marshall cannot be charged with negligence because he used the means of disembarking which the captain in effect furnished him and directed him to use.

Our next point is this. As stated, the admiralty rule is that on an appeal there is a trial *de novo*, but that the appellate court will usually accept the findings of the trial court unless such findings are clearly against the weight or preponderance of the evidence. We submit that the clear weight and preponderance of the evidence show that Marshall, while he was concentrating on the jump he was about to make, did not hear Nelson call to him and that the court's finding that he did is clearly erroneous.

And finally we submit that if we assume for argument's sake that Marshall did hear and ignore Nelson's call, it does not show any negligence on his part. If Marshall did hear Nelson's warning (which we emphatically deny), the situation was this: the master of the ship, the captain, who was behind him and so must also have heard Nelson's warning and who was charged with the primary responsibility of protecting him and had in effect furnished him with the means of disembarking which he was using, was tacitly directing him to ignore the warning and to jump; whereas Nelson, a sailor, engaged in work on the barge, who owed him no duty, was telling him not to jump. He, not knowing what the pitch of the sea could do to him, used the means of disembarking with which he had been furnished and followed the

captain's tacit direction and jumped. *He cannot be charged with negligence in so acting.*

D. MARSHALL'S ADMISSION DOES NOT PRECLUDE MARSHALL'S RECOVERY OR SHOW THAT HE WAS NEGLIGENT.

The court found that Marshall admitted to the captain and the first officer "that the accident was his fault" (R 15).

Marshall testified:

"Q. Now, Mr. Marshall, will you tell me about the conversation you had with the Captain after you returned to the vessel in which the matter of fault was discussed?

A. Well, you have that all in my deposition. When we came back to the ship and I was in bed in my cabin, the Captain came by to see me, as he did often after that, and I felt he was worrying a great deal about it, and I didn't know how badly hurt I was, and we had about ten days to go through the Straits, and I said, 'Don't worry. Don't give it a thought. I feel it was my fault.'

Q. And did you make that statement to him more than once?

A. I don't think so, but if I did I will certainly stand behind it.

Q. Did you make the same statement to the Chief Officer?

A. Yes, I did.

Q. And along about the same lines as this conversation with the Captain?

A. Yes, I said I didn't want him to worry, that I thought it was my fault.

Q. Did you at the same time make any reference to the fact that you weren't quite as young as you thought you were, or any other comment about the circumstances?

A. Oh, yes, I could have very likely said that, and I am willing to say that I did say it.

Q. Mr. Marshall, about when did you have any conversation with the Captain? How long after the accident?

A. Oh, I think, as I recall, it was the night I came back from Valdivia and I was in the cast in my cabin.

Q. When was it that you made a similar statement to the Chief Officer?

A. I don't know for sure, but I would think either that night or the next morning." (R 74-75.)

The captain testified that Marshall had told him in Marshall's cabin—he could not recall when the conversation took place—that “it was his own fault”; that “it had nothing to do with you.” (SD 11.)

Kaldefoss testified that he had a conversation with Marshall in the latter's cabin in the evening of the day of the accident in which Marshall said: “It's my own fault. I thought I was younger than I am.” (KD 13.)

In *The Ocracoke*, supra, the Libelant after his injury stated that he was to blame for the accident. The court in dealing with this part of the case said:

“... These statements are not entitled to great weight, especially when they are introduced to impeach the evidence of thoroughly reliable wit-

nesses. The Supreme Court of the United States in *Coasting Co. v. Tolson*, 139 U.S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, stated to some extent its view of this class of testimony, and the court can but feel that employees of corporations frequently weaken, instead of strengthen, their cases in the vigilance displayed in procuring evidence of this character, at a time when the humanities of the case would appear to call for sympathy for the injured persons, rather than to commit them to statements that would deprive them of what might be their just dues."

But there is a more conclusive answer so far as this testimony of Marshall is concerned. When Marshall made these statements to the captain and the first officer, he did not know the extent of his injuries, nor the duties respondent owed him, or his rights against respondent. He was just trying to do what was kind under the circumstances, that is, to allay any anxiety the captain and first officer might feel.

But since the respondent as a matter of law is liable to Marshall, the latter's statement to the captain and first officer was simply a statement of an erroneous legal conclusion and cannot be used to support the court's finding that Marshall was negligent.

In 31 C.J.S. 1186, the textwriter says:

"... However, a mere acknowledgment of fault or liability is insufficient to establish the same if there is no liability or actionable fault present as a matter of law, as where such admission is made in ignorance of declarant's rights and responsibilities. Similarly plaintiff's statement at the

time of the incident, that defendant was not at fault, is not conclusive so as to preclude recovery, such statement being as to a question of law. Nevertheless such an admission of fault coupled with facts which may constitute liability in law may be sufficient to support a finding of liability.”

See also:

McClusky v. Duncan, 216 Ala. 388, 113 So. 250, 252;

Parker v. Employers' Casualty, 152 So. 373 (La. App.);

Robb v. Pike, 119 Fla. 833, 161 So. 732, 733.

E. EVEN ASSUMING FOR ARGUMENT'S SAKE THAT MARSHALL WAS NEGLIGENT, HE UNDER THE ADMIRALTY DOCTRINE OF COMPARATIVE NEGLIGENCE IS NEVERTHELESS ENTITLED TO RECOVER.

The common law doctrine of contributory negligence, which bars recovery where the plaintiff has been guilty of negligence contributing to the accident, does not apply to suits in admiralty like the case at bar. In this suit, the admiralty doctrine of comparative negligence applies. Under this doctrine where a passenger on a vessel has been injured by the vessel's negligence and where the passenger himself has been guilty of negligence contributing to his injuries, the court may divide the damages, or apportion them, according to the degree of fault. *The Max Morris*, 137 U.S. 1, 11 S. Ct. 29; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202; *The Tourist*,

265 Fed. 700 (D. Me.); *The Lackawanna*, 151 Fed. 499 (S.D. N.Y.); *Byrd v. Napoleon Ave. Ferry Co.*, 125 F. Supp. 573 (E.D. La.), aff'd., 5 Cir., 227 F. 2d 958, cert. denied, 351 U.S. 925; and 2 C.J.S. 167.

Respondent did not contend in the trial court that this doctrine was not applicable to this case as a matter of law; but it contended that it was not applicable as a matter of fact because Marshall's injuries were not caused in any way by its negligence or that of its master and crew, but solely by his own; and the trial court so found.

Assuming for argument's sake that Marshall was negligent, the court's finding that respondent and its master were not guilty of negligence is contrary to both the court's findings of specific facts and the uncontradicted evidence.

It follows that Marshall is entitled to recover a proportion of his damages even if we assume his negligence, an assumption not supported by the record.

F. ALTHOUGH THE EXTENT OF MARSHALL'S DAMAGES IS NOT AN ISSUE ON THIS APPEAL, IT SHOULD BE REMEMBERED THAT HE SUFFERED A SEVERE AND PAINFUL INJURY.

We have already mentioned Marshall's testimony that while he was going to Valdivia with the captain his knee was constantly getting bigger until it became the size of a large cauliflower; and that after he had been taken to the hospital at Valdivia the doctor there

aspirated the blood which had collected on his knee and put a cast on his knee and that he then returned to the ship.

He also testified that when he got back to the ship he was carried aboard because he could not walk up the gangway; that he remained in his cabin until the ship arrived at Buenos Aires, except that he was able to get out on the deck occasionally for about an hour (R 51-52); that he left the ship at Buenos Aires and remained there for fourteen days waiting to get a reservation on an airplane to return home; that while he was there the blood was twice aspirated from his knee (R. 53, 57); that he flew from Buenos Aires to San Francisco, arriving at the latter place on March 1st, where he consulted with Dr. King of Stanford Hospital (R 53, 57-58) and that Dr. King operated on his knee a few days after his arrival in San Francisco (R 58); that his knee was most painful, particularly when the blood collected in it during the period from the date he hurt it at Corral until he was operated on (R 57); that after the operation, the knee ceased to bleed and ceased to swell, but he then suffered the post-operative pain and the pain inflicted in the physiotherapy which he had to undergo (R 58-59); and that his knee is now a barometer for weather and sore to the touch, but he has no other pain in it and can use his knee as he did before the accident (R 59-60).

Marshall expended \$1,218.43 to pay the hospital and doctors and other incidental expenses connected with his treatment and also about \$100.00 to \$125.00 to pay

the cost of nurses and doctors while he was on the ship and in Buenos Aires (R 60-61).

Dr. King testified that in the accident Marshall had torn apart a ligament of the knee called the anterior cruciate ligament (as shown by Exhibit 5 for identification, this ligament is one of the big ligaments in the knee) and that in the operation he stitched the torn ligament together. (R 106-109.)

The injuries Marshall suffered as a consequence of the flagrant breach by respondent and its master of the duties owed by them to Marshall were severe. It is simple justice that he be compensated for them.

V. CONCLUSION.

We respectfully submit that since both the trial court's findings and the uncontradicted testimony establish that Marshall is entitled to recover, this court should reverse the judgment with directions to the lower court to determine the amount of Marshall's damages and to enter judgment for him for that amount.

Dated, San Francisco, California,
October 28, 1957.

Respectfully submitted,

MORSE ERSKINE,

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Attorneys for Appellant.

No. 15612

United States
Court of Appeals
for the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COMPANY, a corporation, and PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation, Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District and WILLIAM LASCHE, Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Southern Division

FILED

AUG 21 1957

PAUL P O'BRIEN, CLERK

No. 15612

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Southern Division

No. 1677—Civ., S. D.

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs,
vs.

WARREN H. PILLSBURY, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, and WILLIAM LASCHE,
Defendants.

COMPLAINT TO REVIEW COMPENSATION
ORDER AND FOR INJUNCTION

I.

This complaint is filed by plaintiffs for the purpose of reviewing and setting aside as not in accordance with law an order for the payment of compensation made by Deputy Labor Commissioner Warren H. Pillsbury for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor on October 19, 1954, which reaffirmed and confirmed a prior compensation order made by Albert J. Cyr on May 17, 1951; said order of October 19, 1954 purported to be by virtue of authority conferred upon said Deputy

Labor Commissioner Warren H. Pillsbury, by provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C.A., Sec. 901 et seq.

II.

This Court has jurisdiction of the matters concerned in this complaint by provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. Sec. 921 (b).

III.

Crescent Wharf & Warehouse Company, a corporation duly organized and existing by virtue of the laws of the State of California, is made a party plaintiff to this action because it is the employer against whom the order for the payment of compensation to the employee has been made.

IV.

Pacific Employers Insurance Company, a corporation duly organized and existing by virtue of the laws of the State of California, is made a party plaintiff to this action because it is the insurance carrier for the employer plaintiff and is the party liable to the employer plaintiff on the orders herein complained of.

V.

Warren H. Pillsbury, as Deputy Labor Commissioner aforesaid, is made a party defendant herein, because it is his order dated October 19, 1954 of which complaint is hereby made.

VI.

William Lasche is made a party defendant herein because he is the employee and claimant in whose favor the order has been made.

VII.

Certain relevant portions of the said Longshoremen's and Harbor Workers' Compensation Act are as follows:

Section 902 (2) of Title 33, U.S.C.A. provides:

"The term 'injury' means accidental injury [3] or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury . . . "

Section 914 (f) of Title 33, U.S.C.A. provides:

"If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 and an interlocutory injunction staying payments is allowed by the court as provided therein."

VIII.

A. On or about September 6, 1950, the claimant

above named was in the employ of the employer above named as a longshoreman in and about San Diego Harbor, State of California.

B. The claimant testified at a hearing held before Deputy Commissioner Albert J. Cyr, on April 4, 1951, that on September 6, 1950, claimant herein, while performing services as a longshoreman foreman for said employer, sustained injuries while jumping from the top of a hatch of about three feet in height; that he landed on his left foot, which gave way and allegedly caused muscular injury to left foot and leg. The claimant testified, and the evidence revealed, that said alleged injury occurred at about 7:30 to 8:00 P.M. of said date, but claimant continued to work the balance of his shift; that the day after the alleged injury there was no work available, but claimant worked in his regular employment the second day following [4] said alleged injury and continued to work for a period of eight to nine days thereafter; that nine or ten days after the alleged injury, claimant sought the services of F. Bruce Kimball, M.D., a physician of his own choice, who massaged the injured area and took x-ray photographs of the left hip, knee and leg of said claimant. Said x-rays disclosed no evidence of fracture, dislocation, or other skeletal abnormality in the hip region. The claimant testified that the condition of his left leg did not improve and that he voluntarily ceased being treated by Dr. Kimball and on October 9, 1950 sought the services of Wilfred M. Knudtson, D.O.; that on October 23, 1950,

Dr. Knudtson caused further x-ray photographs to be taken of his left leg and hip region and reported no evidence of a fracture line or fracture, though claimant's left leg was somewhat shorter than his right leg. Claimant further testified that from the period September 6, 1950, to November 7, 1950, he was unable to work for twelve intermittent days. Claimant testified that on November 7, 1950 he was climbing a step ladder in the garage of his home while off work; that while raising himself with his weight on his left foot and leg, he then standing on the second or third step of said step-ladder, his left leg gave way, causing him to step steeply backward and downward to the floor on his right foot, bringing his left foot to it; that his left leg gave way again after he stood on the floor, causing him to descend backwards on the floor with both legs stretched out in front of him; that he then suffered pain in his left hip and shortly thereafter, upon being medically examined and x-rayed, he was found to be suffering from a fracture of the neck of the left femur.

C. Application for compensation was made by the claimant and after due notice to the parties, a hearing was held on April 4, 1951 before Deputy Commissioner Albert J. Cyr; the parties and their counsel appeared and testimony was taken; [5] stenographic notes of the testimony were made and duly transcribed and filed of record with said Deputy Commissioner. To said claimants petition the employer and insurance carrier herein appeared

and answered, admitting that the claimant sustained a compensable injury and disability sustained by claimant after November 7, 1950, was the natural or the unavoidable result of the first injury; that said second injury was caused by the claimant's own intervening negligence or carelessness, and was not compensable because the added injury did not arise from the hazards of the employment; that the claim should be dismissed in part, and compensation awarded only for injury or disability suffered by the first injury.

D. On May 17, 1951, said Deputy Commissioner Albert J. Cyr made certain finding of fact, inter alia, that claimant's second fall and injury from the step ladder in his garage was "directly attributable" to the first injury of September 6, 1950; that claimant was entitled to compensation for temporary total disability from the date of such first injury. Whereupon plaintiffs were ordered to pay the lump sum of \$805.00, representing compensation benefits accruing from date of the original injury to the date of the hearing, April 4, 1951, and to pay thereafter the sum of \$35.00 per week during the continuance of the temporary total disability of said claimant, or until further order of the Deputy Commissioner.

E. On June 14, 1951, plaintiffs herein brought review proceeding in this Court wherein said compensation order was annulled in part and the file remanded to the Deputy Commissioner who then caused an appeal to be taken to the Circuit Court

of Appeals for the Ninth Circuit, and said Court on March 30, 1954, reversed the decision of this District Court and remanded the case to the Deputy Commissioner to hold another hearing and try a certain issue of fact, namely, whether or not [6] the second injury was or was not the natural or the unavoidable result of the first injury, instead of a finding that the second injury was "directly attributable" to the first injury.

IX.

In conformity with said order of the Circuit Court of Appeals, a second hearing was held on June 23, 1954 before Deputy Commissioner Warren H. Pillsbury, inasmuch as Albert J. Cyr had meanwhile been transferred to another Compensation District. The parties and their counsel appeared and additional testimony and evidence was taken; stenographic notes of the testimony were made and duly transcribed and filed of record with said Deputy Commissioner Warren H. Pillsbury. Pertinent portions of said hearing were as follows:

A. Medical experts offered additional testimony concerning the comparative extent of claimant's injuries after the first fall and the second fall. Dr. W. M. Knudtson stated that his written opinion rendered at the first hearing of April 4, 1951, to the effect that the first injury probably weakened structures around the head and neck of claimant's left femur, was merely a surmise as there was no objective evidence of any kind of such weakened struc-

tures. Dr. R. G. Lambert testified that because of the nature of claimant's injuries after the first fall and the second fall, it was his expert opinion that the injuries incurred by the second fall were not caused by the first injury and were not the natural or the unavoidable result of the first injury.

B. The claimant, William Lasche, testified additionally that on November 7, 1950, he was on the second step of a step ladder in his garage and was standing wholly on his left foot, when his left leg collapsed and he fell straight down, landing on the garage floor in a sitting position, with both legs out in front of him. [7]

C. Deputy Commissioner, Warren H. Pillsbury, caused an independent medical expert to examine the entire x-ray file submitted into evidence to determine if there was any evidence of a crack, fracture, or other weakness of claimant's left hip joint before the second injury of November 7, 1950. Said x-ray file was forwarded to the United States Public Health Service Hospital of San Francisco, State of California. Said independent medical examination revealed no radiographic evidence of a fracture of any kind of claimant's left hip region of x-ray films made after the first injury, but prior to the second injury. Some demineralization was noted in the proximal portion of the shaft of Claimant's left femur on x-ray film taken November 11, 1950—the first film in which a fracture of any kind is demonstrated, and which x-ray was taken after the second injury.

X.

Thereafter, on October 19, 1954, the Deputy Commissioner Warren H. Pillsbury reaffirmed and confirmed the original compensation order of May 17, 1951, except as to certain additional findings of fact appearing on pages 3-4 of said compensation order of October 19, 1954, viz:

1. "That the circumstances of said episode (claimant's fall from step ladder) do not disclose sufficient strain to the left leg or hip at the time claimant stepped down to the floor or at the time he sat down immediately thereafter to explain the occurrence of said fracture as the result of a new accident; . . . "

2. "That claimant probably sustained an open separation of the bone of the femur at the site of the fracture at the time he placed his weight on his left leg on the second or third step in ascending the step-ladder; . . . "

3. "That there was no negligence or want of ordinary care on the part of claimant in attempting to go up said step ladder; . . ." [8]

4. "That a comparison of the series of x-rays taken before and after November 7, 1950 shows some demineralization of the proximal portion of the shaft of the left femur in the x-ray of November 20, 1950, which could have resulted from disuse following the injury of September 6, 1950, and could have made said femur more prone to fracture; . . ."

5. "That considering the foregoing, including the probability of greater damage in the region of the left hip from the injury of September 6, 1950, than could be demonstrated with certainty by objective diagnosis, the Deputy Commissioner draws the conclusion and finds that the injury of September 6, 1950 caused a weakening of the femur in some way not fully disclosed and was a substantial contributing cause to the separation of said femur on November 7, 1950, and that therefore the additional disability sustained by claimant after November 7, 1950 was a natural result of the first injury of September 6, 1950 . . . "

Plaintiffs were then ordered to pay the lump sum of \$3850.00 representing compensation benefits accruing from May 14, 1952 to the date of the second hearing, June 23, 1954, and to pay thereafter medical expenses and the sum of \$35.00 per week until a change in claimant's total temporary disability, or until further order of the Deputy Commissioner.

XI.

The findings of fact set out in Paragraph X above, and the order and award of the Deputy Commissioner are not in accordance with the law and should be set aside for the following reasons:

1. That the medical evidence in the record is insufficient to sustain the finding that the additional disability incurred by claimant after the second accident of November 7, 1950, was a natural result of the first injury of September 6, 1950;

2. That there is in the record of the testimony in this case no competent evidence, medical or otherwise, to establish [9] the finding that the second injury in any way arose or occurred in the course of claimant's employment;

3. That is did not lie within the Deputy Commissioner's powers to render findings of fact based upon mere conjecture and prophesy, and statements of probability that are unsupported by any evidence do not constitute findings of fact;

4. That the findings of fact above set out are so manifestly arbitrary and unreasonable as to transcend the authority of said Deputy Commissioner whereupon he acted without and in excess of the jurisdiction of his office and his powers as a hearing officer;

5. That there is in the record of the testimony in this case no evidence whatsoever to support the award of compensation as ordered by said Deputy Commissioner, and the plaintiffs herein will be irreparably damaged if an interlocutory injunction is not granted and the payment of compensation under said award stayed, pending the final hearing on this complaint to reverse and set aside the award of compensation;

6. That claimant herein is financially irresponsible and if the order and award are set aside, plaintiffs would not be able to recover back payments which have been made pursuant to the award of said Deputy Commissioner, and plaintiffs would be

irreparably damaged because its judgment would be uncollectible;

7. That said order of the Deputy Commissioner is different than the ordinary compensation order in that substantial medical expenses have accumulated since the date of the second accident; such an amount is, in effect, an award of a lump sum, and to cause plaintiffs to pay such lump sum would cause additional irreparable damages where it appears that said award, as indicated, is unsupported by the evidence and plaintiffs would not be able to recover such lump sum payment if the order and award are set aside because of claimant's aforementioned financial irresponsibility; [10]

8. That the order of compensation and award violate the Fifth Amendment to the Constitution of the United States wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means or remedy for the recovery thereof.

XII.

The claim for compensation together with the duly transcribed notes of testimony and all evidence submitted at the hearing of June 23, 1954 and the award of the Deputy Commissioner are in the custody of the said defendant, Warren H. Pillsbury, and it is necessary for this Court to have possession of the papers and the records of said hearing, and all other relevant papers, transcribed notes of testimony, and evidence of the hearing of April 4, 1951,

which are believed to be in the custody of said defendant, in order to determine whether or not the award of said Deputy Commissioner Warren H. Pillsbury, was in accordance with the law.

XIII.

The plaintiffs herein have no adequate remedy at law and have no means for the redress of the wrongs whereof they herein complain except through injunction proceeding, mandatory or otherwise, to set aside the order and award herein referred to.

Wherefore, plaintiffs pray:

1. That a mandatory injunction be granted by and issued from this Court to defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, commanding him within fifteen (15) days from receipt thereof, to deliver to this Court or the Clerk thereof, a certified transcript of the transcribed notes of testimony and the award of compensation, and all other papers or matter relevant to the hearing conducted by him in the case of William Lasche vs. Crescent Wharf & Warehouse Co. and [11] Pacific Employers Insurance Co., Case No. 76-2740, wherein hearings were held on April 4, 1951, and June 24, 1954.

2. That an interlocutory injunction be issued restraining the said defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compens-

sation District of the United States Employees' Compensation Commission, from enforcing said award of compensation or imposing any penalty upon the plaintiffs for not paying the installments and sums in accordance with said award and that said order and award be suspended during the pendency of this action.

3. That forthwith upon the filing of this Complaint, an order to show cause why an interlocutory injunction pending this suit should not be granted and made in like manner and effect as hereinbefore prayed.

4. That a permanent injunction be granted by and issued from this Court to the defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, perpetually restraining and enjoining the defendant from enforcing the aforesaid award of compensation.

5. That a mandatory injunction be granted by and issued from this Court to said defendant Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, directing him to set aside the findings of fact heretofore made, and that he be ordered to make an order dismissing and disallowing said claim insofar as disability from the second injury of November 7, 1950 is considered and weighed in making an award for whatever disability occurred as a result of the first injury of September 6, 1950.

6. Plaintiffs pray such other and further relief as [12] the exigencies of the case may require.

Dated: November 15, 1954.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT, JR.,

Attorneys for Complainants Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company. [13]

Duly Verified.

[Endorsed]: Filed Nov. 16, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon filing of the verified complaint herein and upon motion of Higgs, Fletcher & Mack, attorneys for plaintiffs herein, it is ordered, adjudged and decreed that the defendants Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District of the United States Employees' Compensation Commission, and William Lasche show cause, if any they have, before the District Court of the United States for the Southern District of California, Southern Division, at 10 a.m., on the 7th day of December, 1954, at the Court Room, U. S. Custom and Court House Building, in the City of San Diego, State of California, why a preliminary injunction should not issue pendente lite as prayed for in the complaint herein, enjoining

said defendants from enforcing a Compensation Order and Award issued [15] by Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation Commission, on October 19, 1954, being Case No. 76-2740, and further restraining said defendants from imposing any penalty upon the plaintiffs herein for not paying the installments and sums in accordance with said order and award, and that said compensation order and award be suspended during the pendency of the above action.

It is further ordered that, sufficient cause having been shown, service of this order, with copies of said complaint and motion for order to show cause contained therein, shall be sufficient notice and service to the defendants herein.

Dated: November 16, 1954.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed Nov. 16, 1954.

[Title of District Court and Cause.]

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came on to be heard at this term upon an order to show cause granted November 16, 1954, upon motion of Higgs, Fletcher & Mack, attorneys for plaintiffs herein, for a preliminary injunction to enjoin defendants from enforcing or collecting any awards, sums, or penalties pursuant to a Compensa-

tion Order and Award dated October 19, 1954, Case No. 76-2740, issued by Warren H. Pillsbury, Deputy Labor Commissioner for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor.

It appearing to the satisfaction of the court from the verified bill of complaint herein, and after hearing counsel for the respective parties, that the plaintiffs are entitled to a judgment against the defendants restraining the commission and continuance of certain acts which, during the [24] pendency of this action, would produce injury to the plaintiffs herein, and that a good and sufficient cause of action exists against the defendants in favor of the plaintiffs for the relief demanded in the complaint and for a preliminary injunction order pending the trial of this action, the grounds of which, briefly stated, are as follows: (1) that a preliminary injunction may issue against a compensation order if it appears that substantial questions of law and fact exist and that irreparable injury can be prevented; (2) that a question of law exists as to whether claimant's injury is within the purview of the Longshoreman's Compensation Act; (3) that questions of law exist as to whether there is substantial evidence to support the findings of the Commissioner; as to whether he ignored proper evidence presented; as to whether he made findings based upon mere conjecture and probability; (4) that irreparable damage ensues where plaintiffs are ordered to pay a lump sum award of medical expenses to a financially irresponsible claimant,

It further appearing to the court that plaintiffs are without any adequate remedy at law and are entitled to the relief demanded in the bill of complaint enjoining and restraining defendants from enforcing said Compensation Order and Award, or imposing any penalties upon the plaintiffs herein for not paying said sums and awards, except that weekly disability payments of \$35.00 per week will continue to be paid to defendant William Lasche during the pendency of this action,

It is, on motion of Higgs, Fletcher & Mack, attorneys for the plaintiffs in this action,

Ordered, that the defendants, and their officers, agents, employees, and attorneys be, and they hereby are, [25] and each and every of them is jointly and severally enjoined and restrained from enforcing or collecting any awards, sums, medical expenses, or penalties, except weekly disability payments of \$35.00 per week which will continue to be paid by plaintiffs to defendant William Lasche during the pendency of this action.

But this injunction order shall not take effect unless and until the said plaintiffs, or some one for them, shall execute a bond, payable to the said defendant William Lasche, conditioned according to law, to be approved by the court or clerk of the court, in the penalty of \$2,000.00.

It appearing to the court that the defendants in said bill are all represented by the same counsel, it is further ordered that service of this order on such counsel shall be equivalent to personal service on them.

This order shall continue in force until revoked or modified by further order of the court.

Dated this 8th day of December, 1954.

/s/ BEN HARRISON,
United States District Judge.

Approved as to Form:

/s/ (Illegible)

Attorney for Defendants. [26]

[Endorsed]: Filed Dec. 8, 1954. Judgment Docketed and Entered Dec. 9, 1954.

[Title of District Court and Cause.]

ANSWER

Now come the Defendants and for their answer to the Complaint To Review Compensation Order And For Injunction herein, admit, deny and allege as follows:

I.

Admit the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and XII of the Complaint To Review Compensation Order And For Injunction.

II.

Deny generally and specifically all of the allegations contained in Paragraphs VIII, IX and X of said Complaint To Review Compensation Order And For Injunction and alleges that all of the [27] facts and circumstances pertaining to the injury of William Lasche complained of herein are set forth

in the original proceedings of Deputy Commissioner Albert J. Cyr, a certified copy of which will be presented to the Court upon the hearing thereof, and the supplemental proceedings of Deputy Commissioner Warren H. Pillsbury, a certified copy of which will be presented to the Court upon the hearing thereof, and that said original proceedings are available to the plaintiffs for inspection.

III.

The defendants deny the allegations contained in Paragraph XI of said Complaint.

Further answering the Complaint, the defendants aver that it is shown by the certified copy of the record before Deputy Commissioner Cyr and Deputy Commissioner Pillsbury that the findings of fact and the compensation award complained of are supported by substantial evidence, and under the law such findings are final and conclusive and not subject to review; that at the trial the certified copy of the record before Deputy Commissioner Cyr and Deputy Commissioner Pillsbury will be offered in evidence by the defendants to be reviewed by the Court.

Wherefore, defendants pray that judgment be entered herein affirming said award in all respects and that the Complaint be dismissed.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,

Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service attached.

[Endorsed]: Filed Jan. 6, 1955.

[Title of District Court and Cause.]

REQUEST FOR SETTING FOR TRIAL

Now comes Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, the plaintiffs in the above cause, and by their attorneys, Higgs, Fletcher & Mack, state that the above cause is now at issue and has been for at least five (5) days, and therefore requests the Court to set the within cause for trial.

Dated: February 7, 1955.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiffs. [30]

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR SUMMARY
JUDGMENT

To: Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, and to Higgs, Fletcher & Mack, their attorneys:

You, and Each of You, Will Please Take Notice that the defendants, by and through the undersigned, will bring the above and foregoing Motion on for hearing before the above entitled Court, in the Courtroom of the Honorable Peirson M. Hall, United States District Judge, in the United States Custom & Court House, San Diego, California, on Monday, the 28th day of March, 1955, at the hour of 10 a.m. on that day, or as soon thereafter [33] as counsel can be heard.

Dated at Los Angeles, California, this 15th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Come now the defendants, by and through their attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz, Assistant United States Attorney, and move the Court that it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a Summary Judgment in their favor, pursuant to their prayer in their Answer on file herein, on the following grounds and for the following reasons:

I.

That the pleadings on file show that there is no genuine issue as to any material fact on this motion and that the defendants are entitled to a judgment as a matter of law. [35]

II.

That the within action is a review of administrative proceedings and an order for the payment of compensation made by Deputy Labor Commissioner Warren H. Pillsbury, for the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor, on October 19, 1954; that said Order and the record upon which it is based are correct and proper and that said Order should be affirmed.

This Motion is based on and will be presented upon the records and files herein, all of the pleadings filed by the respective parties hereto, and the

certified records of compensation hearings before the Bureau of Employees' Compensation, dated October 19, 1954 and May 17, 1951, and upon the Memorandum of Points and Authorities attached hereto.

Dated this 15th day of March, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ MAX F. DEUTZ,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

STATEMENT OF GENUINE ISSUES IN OP-
POSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

I.

The legal memorandum of points and authorities of defendants in support of their motion for summary judgment correctly sets forth the findings of fact and awards of Deputy Commissioners Albert J. Cyr and Warren H. Pillsbury, dated May 17,

1951 and October 19, 1954 respectively. The annexed affidavit of Rex W. Looney, agent for the plaintiff insurance carrier herein, indicates the amount of compensation and medical expenses paid to claimant William Lasche by said carrier up to and including November 30, 1954.

II.

For a statement of the genuine issues that appear in this action, plaintiffs respectfully direct the Court's attention to Paragraph XI of the complaint herein. In substance the genuine issues are: [67]

1. Whether or not a consequential injury arises out of the employment where it is due to a new and added peril to which the employee has needlessly exposed himself.

2. Whether or not the District Court is bound to unqualifiedly accept the findings of the Deputy Commissioners.

3. Whether or not a causal relationship between the injury and the employment must be established before a compensation award is justified.

The memorandum of points and authorities previously filed, and the attached supplemental memorandum of points and authorities indicate the arguments and authority thereof as to why plaintiffs contend the above Commissioners' orders and awards should be annulled and the matter be referred to said Commissioners to fix, after a hearing if necessary, compensation for the period which the

original disability might have continued if the second accident had not occurred.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiffs. [68]

Affidavit of Service by Mail Attached.

Pacific Employers Insurance Company
Home Office: 1033 S. Hope St., Los Angeles 15, Cal.

Statement of payments made to and on behalf of
William Lasche to and including November 30, 1954.
Indemnity paid to William Lasche..... \$7490.00
Medical and Hospital expenses paid..... 1966.10

Total \$9456.10

Self procured medical and hospital ex-
penses for which reimbursement is
claimed (Total of bills and receipts
transmitted by letter of Deputy Commis-
sioner dated November 24, 1954..... \$2181.73

The undersigned does hereby certify that the
above is a true and correct statement of the rec-
ords of Pacific Employers Insurance Company, and
that such records are kept under his supervision
and direction.

/s/ REX W. LOONEY.

State of California,
County of San Diego—ss.

On this 6th day of December, A.D., 1954, before
me, Louise Peper, a Notary Public in and for said

County and State, personally appeared Rex W. Looney, known to me to be the Branch Claims Superintendent of Pacific Employers Insurance Company and the person whose name is subscribed to the within Instrument and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed by official seal the day and year in this certificate first above written.

[Seal] /s/ LOUISE PEPER,
Notary Public in and for said County and State.

My Commission expires August 15, 1957. [70]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 25, 1955.

[Title of District Court and Cause.]

NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

To: Laughlin E. Waters, United States Attorney,
Max F. Deutz, Assistant United States Attorney,
Chief, Civil Division, 600 Federal Building,
Los Angeles 12, California, Attorneys for
Defendants:

Please take notice that upon the pleadings herein and the annexed Memorandum of Points and Authorities, upon all the proceedings and records on file herein, and the certified records of compensation hearings before the Bureau of Employees' Compensation dated October 19, 1954 and May 17,

1951, the undersigned will make a cross-motion before this Court upon the argument of your said motion in the United States Custom and Court House, San Diego, California, on Monday, the 28th day of March, 1955, at the hour [72] of 10:00 a.m., or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56 of Federal Rules of Civil Procedure, directing that summary judgment be entered in favor of the plaintiffs herein, and for such other and further relief as the Court may deem just.

Dated: March 25, 1955.

HIGGS, FLETCHER AND MACK,
/s/ By JOHN W. BURNETT, JR.

Attorneys for Plaintiffs. [73]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

ORDER REMANDING CASE TO COMMISSIONER

The Commissioner, on rehearing, made a finding that "there was no negligence or want of ordinary care on the part of claimant in attempting to go up" the stepladder which attempt preceded his second injury, resulting in this dispute.

That finding is not in accord with the Opinion of the Court of Appeals in *Cyr et al. v. Crescent Wharf, etc.* (9 Cir. 1954) 211 F. 2d 454, which pro-

vided that the case be remanded to the Commissioner "to try the issue as to whether the second injury was or was not the natural or the unavoidable result of the first injury."

Lack of negligence or the exercise of ordinary care does not mean that the second injury was either the natural or the unavoidable result of the first injury.

The case is remanded to the Commissioner with directions to make specific findings either from the present [87] record or such additional record as he may require, as to whether or not the second injury "was or was not the natural or the unavoidable result of the first injury."

Dated: Los Angeles, California, this 27th day of June, 1955.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Judgment, Docketed. Entered and Filed June 27, 1955.

[Title of District Court and Cause.]

MOTION TO VACATE ORDER

The defendants move the Court to vacate its Order Remanding Case to Commissioner made and entered herein on June 27, 1955.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,

Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JOSEPH D. MULLENDER, JR.,

Assistant U. S. Attorney,
Attorneys for Defendants.

[Endorsed]: Filed August 3, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Plaintiffs Above Named and to Their Attorneys, Higgs, Fletcher and Mack:

You will please take notice that the defendant, Warren H. Pillsbury, by and through the undersigned will bring the within Motion on for hearing before the above Court in the Courtroom of the Hon. Peirson H. Hall, United States District Judge, at the Post Office and Courthouse Bldg., Los Angeles, California, on Monday, the 11th day of March, 1957 at 10 o'clock a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated: This 25th day of February, 1957.

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for defendants. [91]

MOTION TO DISMISS

Warren H. Pillsbury, the defendant in the above entitled cause by Laughlin E. Waters, United States Attorney, Richard A. Lavine, Assistant U. S. Attorney and Jordan A. Dreifus, Assistant U. S. Attorney, his attorneys, moves the Court as follows:

I.

This action was commenced against the defendant, Warren H. Pillsbury on November 16, 1954 and the case is now under submission to the Court pursuant to the Order of the Court made August 2, 1955.

II.

This action was commenced against the defendant Warren H. Pillsbury in and on account of his official capacity as an officer of the United States, namely, as Deputy Commissioner, United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

III.

On December 31, 1955, the defendant Warren H. Pillsbury retired and ceased to hold office as an officer of the United States including the above said office of Deputy Commissioner of U. S. Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

IV.

The defendant Warren H. Pillsbury was succeeded in the above said office of Deputy Commissioner, U. S. Department of Labor, Bureau of Employees Compensation, 13th Compensation District by Charles F. Hanson on February 9, 1956.

V.

No Order substituting the successor in office of the defendant Warren H. Pillsbury as party defendant has been made although six months have expired since the successor took office. [92]

Wherefore, the defendant Warren H. Pillsbury moves that this action be dismissed.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

/s/ JORDAN A. DREIFUS,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

STIPULATION OF CONTINUANCE

It Is Hereby Stipulated between the parties that the Motion to Dismiss made by the defendant, Warren H. Pillsbury, now pending, shall be continued to the 18th day of March, 1957, at 10 a.m. at the United States Court House, San Diego, California, before the Hon. Jacob Weinberger, United States District Judge.

It Is Further Stipulated that the plaintiffs may at the same time, date and place, bring on for hearing any motion of their own relating to substitution of another defendant in the place and stead of the defendant, Warren H. Pillsbury.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT,

Attorneys for Plaintiffs. [97]

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief of Civil Division,

/s/ JORDAN A. DREIFUS,

Assistant U. S. Attorney,

Attorneys for Defendants.

It Is So Ordered: This 11th day of March, 1957.

/s/ JACOB WEINBERGER,

U. S. District Judge. [98]

[Endorsed]: Filed March 11, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendants Above Named and to Their Attorneys, Laughlin E. Waters, United States Attorney; Richard A. Lavine, Assistant U. S. Attorney, Chief of Civil Division; Jordan A. Dreifus, Assistant U. S. Attorney:

You will please take notice that the plaintiffs, by and through the undersigned, will bring the within motion on for hearing before the above court in the courtroom of the Honorable Peirson M. Hall, United States District Judge, at the post office and courthouse building, San Diego, California, on Monday, the 18th day of March, 1957, at 10:00 o'clock a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard.

This notice of motion has been shortened as far as time of service by the written stipulation previously filed between the respective attorneys of the parties herein.

Dated this 14th day of March, 1957.

HIGGS, FLETCHER & MACK,
/s/ By JOHN W. BURNETT, JR.,
Attorneys for Plaintiff. [100]

MOTION FOR SUBSTITUTION NUNC PRO TUNC

Plaintiffs, by and through their attorneys of record, Higgs, Fletcher & Mack, by John W. Burnett,

Jr., move the court for an order substituting Charles F. Hanson as one of the defendants herein in place of Warren H. Pillsbury, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District, on the ground that the term of office of said Warren H. Pillsbury apparently expired on December 31, 1955; that said Charles F. Hanson apparently took office as said Deputy Commissioner on February 9, 1956, and now holds such position; and that there is substantial need for continuing this action against said Charles F. Hanson, as more particularly appears from the affidavit of John W. Burnett, Jr., Esq. attached hereto.

Plaintiffs further move the court that the aforesaid substitution be entered in the above file, nunc pro tunc, as of August 4, 1956, which date is within six months of the date that said Charles F. Hanson took office as aforesaid.

HIGGS, FLETCHER & MACK,

/s/ By JOHN W. BURNETT, JR.,

Attorneys for Plaintiffs. [101]

AFFIDAVIT IN SUPPORT OF MOTION FOR
SUBSTITUTION NUNC PRO TUNC BY
JOHN W. BURNETT, JR.

State of California

County of San Diego—ss.

John W. Burnett, Jr., Esq., being first duly sworn, deposes and says:

That he is one of the attorneys of record for

plaintiffs in the above-entitled action; that he makes the within affidavit in support of motion for substitution nunc pro tunc for the reason that he is more cognizant of the facts and status of the within action than anyone else connected in the matter; that the above action is a complaint for judicial review and injunctive relief of a compensation order dated October 19, 1954, made by Deputy Labor Commissioner Warren H. Pillsbury which reaffirmed a prior compensation order made by Albert J. Cyr on May 17, 1951.

That on December 8, 1954, a preliminary injunction was granted by United States District Judge Ben Harrison enjoining defendants from enforcing the aforesaid compensation order of October 19, 1954, issued by Warren H. Pillsbury.

That the above matter was submitted after hearing to decision before United States District Judge Peirson M. Hall in July of 1955, and is still under submission before said Judge.

That prior to receipt of defendants' motion to dismiss, and accompanying affidavit of William D. Driscoll in support thereof, affiant had no notice or knowledge, express or implied, that defendant Warren H. Pillsbury had retired as Deputy Commissioner as of December 31, 1955, or that Charles F. Hanson was, on February 9, 1956, appointed as successor in office to Warren H. Pillsbury.

That the compensation order of said Warren H. Pillsbury, dated October 19, 1954, becomes final under the provisions of [104] Title 33 U.S.C. Section 921 within thirty days, unless judicial review

is sought prior to that time. The effect of abating and dismissing the within action automatically means, by operation of law, that the said compensation order is final and conclusive, from which plaintiffs would not be entitled to further judicial review; that one of the allegations of plaintiffs' complaint was that the compensation order of said date violated the Fifth Amendment to the Constitution of the United States wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means of remedy for the recovery thereof; that there is a substantial need for continuing this action against the successor of Warren H. Pillsbury in order to settle the constitutional question raised, and in addition, by operation of Title 33 U.S.C. Section 918, said Charles F. Hanson, as successor Deputy Commissioner, is by law directed and with power to enforce the provisions of the aforesaid compensation order.

/s/ JOHN W. BURNETT, JR.

Subscribed and sworn to before me this 14th day of March, 1957.

[Seal] /s/ BILLIE J. COOPER,
Notary Public in and for said County and State.

My Commission Expires Janary 24, 1961. [105]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 14, 1957.

tions having been brought on for hearing on March 18, 1957; and for further hearing on March 29, 1957; at both hearings the plaintiffs being represented by Higgs, Fletcher & Mack by [119] William Sommer, Esq., the defendant being represented by Laughlin E. Waters, United States Attorney, Richard A. Lavine and Jordan A. Dreifus, Assistant U. S. Attorneys, by Jordan A. Dreifus, Assistant U. S. Attorney; the parties having submitted Affidavits and made arguments both oral and written, the Court, being fully advised in the premises and having made and filed its Memorandum on March 29, 1957, makes the following Findings of Fact, Conclusions of Law and Judgment with respect to this case:

Findings of Fact

1.

This action was commenced against the defendant, Warren H. Pillsbury, on November 16, 1954 and the case has been under submission to the Court pursuant to the Order of the Court made August 2, 1955.

2.

On November 16, 1954, the defendant, Warren H. Pillsbury, held office as Deputy Commissioner, United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District, which was an office of the United States.

3.

This action was commenced against the defend-

ant seeking review of and the setting aside of an Order made by him in his official capacity in the above named office.

4.

On December 31, 1955, the defendant, Warren H. Pillsbury retired and ceased to hold office as Deputy Commissioner of the United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District.

5.

On February 9, 1956, the defendant, Warren H. Pillsbury, was succeeded in the above said office of Deputy Commissioner, [120] United States Department of Labor, Bureau of Employees Compensation, 13th Compensation District, by Charles F. Hanson.

6.

More than six months has expired since the said Charles F. Hanson so succeeded the defendant, Warren H. Pillsbury.

7.

Prior to March 14, 1957, no motion was filed nor was any order made substituting Charles F. Hanson for the defendant, Warren H. Pillsbury in this suit.

Conclusions of Law

1.

This is a suit by the plaintiffs under the provisions of the United States Code, Title 33, Section 921(b), seeking review of an order for payment of

compensation by way of injunction proceedings against a Deputy Commissioner.

2.

The provisions of Rule 25(d), Federal Rules of Civil Procedure, concerning substitution of an officer of the United States who is a party to a suit, apply to this suit.

3.

Where the successor in office of a public officer is not substituted in the suit as a party within the time prescribed in Rule 25(d), the suit must abate as a matter of law.

4.

This suit has therefore abated as a matter of law as to the defendant, Warren H. Pillsbury.

5.

As to the defendant, William Lasche, this Court lacks jurisdiction over the subject matter of the suit. [121]

6.

As to the defendant William Lasche, the Complaint on file herein fails to state a claim upon which relief can be granted.

7.

Judgment should be entered dismissing this suit.

8.

Let judgment be entered accordingly.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1.

That the plaintiffs' Motion for Substitution nunc pro tunc be denied.

2.

That the defendant's Motion to dismiss this suit be granted.

3.

That this suit be and is hereby dismissed.

4.

The parties shall bear their respective costs.

Dated: This 16th day of April, 1957.

/s/ JACOB WEINBERGER,

Judge, U. S. District Court. [122]

Affidavit of Service by Mail Attached.

[Endorsed]: Lodged April 3, 1957. Filed April 17, 1957. Docketed and Entered April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

Notice is hereby given that the plaintiffs, Crescent Wharf & Warehouse Company, a corporation, and

Pacific Employers Insurance Company, a corporation, hereby appeal to the United States Court of Appeals, for the Ninth Circuit, from the judgment denying plaintiffs' motion for substitution nunc pro tunc; granting defendants' motion to dismiss the suit, and ordering that the suit be dismissed, entered in this action on April 19, 1957.

Dated at San Diego, California this 24th day of May, 1957.

HIGGS, FLETCHER & MACK,

/s/ By WILLIAM E. SOMMER,

Attorneys for Plaintiffs. [124]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 131, inclusive, containing the original:

Complaint to Review Compensation Order and for Injunction;

Order to Show Cause;

Memorandum in Opposition to Motion for Preliminary Injunction;

Order Granting Preliminary Injunction;

Answer;

Requesting for Setting for Trial;

Motion and Notice of Motion for Summary Judgment; and Memorandum of Points and Authorities in Support thereof;

Statement of Genuine Issues in Opposition to Defendants' Motion for Summary Judgment;

Notice of Cross-Motion for Summary Judgment;

Supplemental Memorandum of Points;

Order Remanding Case to Commissioner;

Motion to Vacate Order;

Motion and Notice of Motion to Dismiss; Memorandum of Points and Authorities in Support thereof; and Affidavit of William D. Driscoll;

Stipulation for Continuance;

Motion and Notice of Motion for Substitution nunc pro tunc; Memorandum in Support thereof; and Affidavit of John W. Burnett, Jr.;

Supplemental Memorandum by Government;

Supplemental Memorandum by Plaintiffs;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Counter-Designation of Record on Appeal;

B. One volume of Reporter's Official Transcript of Proceedings had on March 29, 1957.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 25th day of June, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By CHARLES E. JONES,
 Deputy.

In the United States District Court, Southern
District of California, Southern Division

No. 1677-SD-W

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, United States Department of Labor,
Bureau of Employees' Compensation, 13th Com-
pensation District, and WILLIAM LASCHE,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

San Diego, California

Friday, March 29, 1957, 2:00 P.M.

Honorable Jacob Weinberger, Judge Presiding.

Appearances: For the Plaintiffs: William E.
Sommer, of Counsel Higgs, Fletcher & Mack, 2250
Third Ave., San Diego 1, California. For the De-

fendants: Laughlin E. Waters, United States Attorneys, by Jordan A. Dreifus, Assistant U. S. Attorney.

(Other matters.)

The Court: Proceed with No. 2.

The Clerk: No. 2: 1677 — Crescent Wharf & Warehouse vs. Pillsbury, etc. Hearing of defendant's motion to dismiss; and motion of plaintiff to substitute party defendant nunc pro tunc.

The Court: This matter is now submitted without further argument. I think I have seen everything that you propose in the way of briefs and arguments.

Mr. Dreifus: Yes, your Honor.

The Court: I take it that you have nothing further to offer other than what you have already presented?

Mr. Dreifus: We have nothing further to say, your Honor, although I understood opposing counsel probably wanted to make some argument.

The Court: If he has something new to offer, but there is no use going over matters that you have already submitted.

Mr. Sommer: I think we have previously discussed with the Court the fact that we are relying on lack of due process of the case; and the other item is estoppel, and the fact that this particular case is not similar to any of the cases which counsel has cited previously. I think everything we have is in the record. [2]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: You have presented that well on both sides, and the Court is now ready to announce the decision.

Mr. Sommer: All right. Fine, your Honor.

The Court: In November of 1954, an injunction proceeding to review a compensation order was filed against Warren H. Pillsbury, Commissioner. He is referred to as Deputy Commissioner here in the title of the plea.

Was he Commissioner or Deputy Commissioner?

Mr. Dreifus: Deputy Commissioner was his correct title.

The Court: All right.

The case was filed in San Diego, but due to the congestion of civil matters at that time, several of the judges participated in the case. On August 3, 1955, it was taken under submission on the merits in Los Angeles. After the first of this year, the case was sent back to San Diego while still under submission. The case was placed on the calendar of this Department of the Court, and further hearings were had. The matter is before us today on two motions. Briefs and arguments having been filed, the Court will now render its decision without hearing further from Counsel.

At this point, may I ask this question: Is there any person other than Pillsbury who was the commissioner in the case at the time? Was there any other commissioner?

Mr. Dreifus: No, your Honor. Mr. Pillsbury was the Commissioner for the Thirteenth Compensation

District which [3] handled the longshoremen's and harbor worker's compensation cases.

The Court: He is referred to here as Deputy Commissioner.

Mr. Dreifus: Yes, your Honor. I believe all of the regional officers who perform those duties are called deputy commissioners.

The Court: There is no one ahead of him, is that correct?

Mr. Dreifus: No one subject to this jurisdiction, I don't believe, your Honor. No one who was before the Court.

Mr. Sommer: Well, actually, your Honor, there was a case previous to this; the one that your Honor decided back in 1951, I think it was—or '52. That case was started after November 1950. The first hearing was held before Deputy Commissioner Cyr, C-y-r, on April 4, 1951.

The Court: Pillsbury took his place?

Mr. Sommer: Pillsbury replaced him, that is correct.

The Court: All right. I remember now.

I will continue with my decision.

It appears that in December of 1955, Pillsbury retired. Although attorneys for the Government and the reviewing parties had some correspondence after that time, the latter were not informed, and state they did not know of the retirement and appointment of a successor.

A motion to dismiss has been made by the Government on the ground that the action has abated by the retirement of [4] Pillsbury and the failure

of the reviewing party to substitute his successor within the six months period prescribed by Rule 25, Subdivision d, Federal Rules of Civil Procedure.

Counsel for the reviewing party have filed a motion to substitute Pillsbury's successor *nunc pro tunc* as of the proper time.

The Government relies mainly upon the case of *Snyder v. Buck*, 340 U. S. Reports 15, wherein one Admiral Buck, paymaster in the Navy, was sued in mandamus to compel him to pay a widow's allowance. Admiral Buck retired, and his successor was not substituted within the six months period.

The judgment had gone against the Government, and it had appealed. However, the Supreme Court ruled that the action had abated, and that the widow had lost her judgment obtained in the District Court. There were dissenting opinions by Justices Frankfurter, Jackson and Clark.

Another case cited by the Government is *Bowles v. Wilke*, 175 Fed. 2nd, Page 35. The suit was brought by Bowles as Administrator of the OPA; Porter succeeded him; and Fleming succeeded Porter. Over a year after Bowles resigned, the United States Attorney moved for a substitution, and the defendants moved to dismiss or abate the action. The Government argued that the United States was the real party in interest; but the Court of Appeals, after an interesting discussion, ruled that Section 25(d) of the Federal Rules of Civil [5] Procedure clearly applied, and the action had abated because there was no substitution of the

party plaintiff within the six months provided by the section.

Counsel for the employer argue that this case is not the usual action against a United States official to enjoin the exercise of his governmental function, such as one to restrain the collection of a tax. There is support for this contention in *Bassett v. Massman Construction Co.*, 120 Fed. 2nd Page 230, a decision of the Court of Appeals of the 8th Circuit. At page 233 of the opinion it was observed:

“(3, 4) * * * This subdivision prescribes the procedure to be ‘through injunction proceedings.’ Although so described, the proceeding is purely one of judicial review of the action of an administrative agency. It lacks a cardinal characteristic of ordinary injunction proceedings directed at administrative orders in that there is (except as to jurisdictional issues) no trial de novo of the facts. (Then there are some cases cited.) Also, the reviewing court is acting really as a court in admiralty with the power to grant injunctive relief especially given by this section. (Again, there were some cases cited.) While the proceeding is injunctive, yet, being in the nature of a review proceeding, it is ‘somewhat analogous to an appeal.’ (More cases cited, one of them being *Associated Indemnity Corporation v. [6] Marshall*, 9 Cir. case, 71 Fed. 2nd, 235, 236.) In short, this proceeding is not the ordinary injunction but is a review proceeding in an admiralty court wherein Congress drew ‘upon another system of procedure to equip the court with

suitable and adequate means for enforcing the standards of the maritime law as defined by the act.''' (And there is another case cited:) *Crowell v. Benson*, 285 U. S. 22, 49.

The recent case of *Chauvers v. Hobby*, reported at 19 Federal Rules Decision at Page 393, also deals with an action which is in the nature of review. Section 405(g) of Title 42 USCA provides for a review by the District Court of the decision of the Administrator of Social Security. The decision of the administrator is made after a hearing had before him at which evidence is introduced. The review contemplated by the section is one analogous in procedure to the review provided for in the section involved in the case at bar, although the Social Security statute does not require that the action should be brought as an injunction proceeding.

In the *Chavers* case, Judge Madden of the New Jersey District Court quoted from Judge Leibell's opinion in *Rossello v. Marshall*, 12 Federal Rules Decisions, to the effect that Rule 25(d) is a harsh rule, but one which is mandatory and which allows no discretion in the district judge.

That the rule is indeed harsh is demonstrated by [7] the circumstances of this case before us. Counsel for Crescent Wharf and Warehouse Company have been industrious in their handling of this matter. The prior review of Mr. Pillsbury's decision regarding this employee was heard in my department of the District Court in about 1951; an appeal was taken, and the matter remanded back to

this Court for remand to the Commissioner. A further hearing was had before the Commissioner, and the present proceeding is a review from his decision. In our view of the case, a rather unusual point of law is involved, and it is one of which counsel for the reviewing party have made a most capable presentation in all their briefs and pleadings.

It is also our view that the failure to substitute Pillsbury's successor was excusable. We cannot see that any counsel is chargeable with neglect of duty in not ascertaining Pillsbury's retirement and the appointment of his successor. And we are satisfied that these matters were not known by the various counsel directly in charge of the case for the Government. Had they been known, ordinary professional courtesy would have indicated that mention of these facts be made to opposing counsel.

The majority opinion in *Snyder v. Buck* rather hinted that Congressional amendment might be desirable. The dissenting opinion of Justice Frankfurter described the state of the law as "compounded of confusion and artificialities". He observed at page 29 of the dissenting opinion that:

"the doctrine of sovereign immunity, whatever its historic bases—is hardly a doctrine based upon moral considerations."

He further observed:

"The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine."

(That is the end of the quote. I have quoted in some portions of this; I might not have called it to your attention but you can look at the copy after we are through here and see just where the quotes are.)

Congress has not yet seen fit to pass legislation to fit cases such as this, and to make effective the words of Justice Frankfurter found at page 30 of the *Snyder v. Buck* case, I quote:

“* * * it has long been the policy of our law to look behind an office-holder nominally a party litigant in order to find that, for all practical purposes, it is a suit against the Government and therefore not maintainable. Justice should be equally open-eyed in order to find behind the nominal official defendant the United States as the real defendant.”

Perhaps a situation such as we have here might be avoided if formal notice of vacancies such as that caused by Commissioner Pillsbury's retirement were given to the various [9] United States Attorneys, and they in turn would give notice to opposing counsel; or, the District Courts, in their supervision over the conduct of cases before them, might require the United States Attorneys to give notice of such matters to parties interested in each particular case.

It is our feeling that the review before us is entirely and essentially an appeal from the decision of Commissioner Pillsbury, with the Crescent Wharf and Warehouse Company as the Appellant,

and William Lasche the employee, as the Appellee. As such, the action should not abate because of the retirement of the man who rendered the decision, and the failure to substitute his successor, any more than an appeal should abate because of the retirement of a judge who rendered a decision, and the failure to substitute his successor.

This Court is bound, however, by the decision of the Supreme Court in *Snyder v. Buck*, and must hold that this action has abated.

The argument that the cause should be kept alive as to the employee is without merit. I cannot find any authority in the statute (Section 921 of Title 33) for joining him as a party defendant.

The Clerk will enter an order that counsel for the United States will prepare the proper order dismissing the action as to all parties, and serve and submit the same within ten days from today.

[Endorsed]: Filed April 12, 1957.

[Endorsed]: No. 15612. United States Court of Appeals for the Ninth Circuit. Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner, United States Department of Labor, Bureau of Employees' Compensation, 13th Compensation District and William Lasche, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed: June 26, 1957.

Docketed: July 2, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15612

CRESCENT WHARF & WAREHOUSE COM-
PANY, a corporation, and PACIFIC EM-
PLOYERS INSURANCE COMPANY, a cor-
poration, Plaintiffs-Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, United States Department of Labor,
Bureau of Employees' Compensation, 13th Com-
pensation District and WILLIAM LASCHE,
Defendants-Appellees.

STATEMENT OF POINT ON APPEAL AND
DESIGNATION OF RECORD, PROCEED-
INGS AND EVIDENCE TO BE CON-
TAINED IN RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

The plaintiffs - appellants, Crescent Wharf & Warehouse Company, a corporation, and Pacific Employers Insurance Company, a corporation, intend to rely on the following point on appeal:

Whether Rule 25(d) of the Federal Rules of Civil Procedure operates to abate the action.

The plaintiffs-appellants hereby designate for inclusion the complete record and all the proceed-

ings and evidence in the action as material to the consideration of the appeal.

Dated: July 2, 1957.

HIGGS, FLETCHER & MACK,

/s/ By CHARLES L. COMIS,

Attorneys for Plaintiffs-Appellants.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 3, 1957. Paul P. O'Brien,
Clerk.

In the
United States Court of Appeals
 For the Ninth Circuit

CRESCENT WHARF & WAREHOUSE
 COMPANY, a corporation, and PACIFIC
 EMPLOYERS INSURANCE COMPANY, a
 corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
 missioner, United States Department of
 Labor, Bureau of Employees' Compen-
 sation, 13th Compensation District, and
 WILLIAM LASCHE,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
 SOUTHERN DIVISION.

**BRIEF FOR APPELLANTS CRESCENT
 WHARF & WAREHOUSE COMPANY &
 PACIFIC EMPLOYERS INSURANCE
 COMPANY**

HIGGS, FLETCHER & MACK
 By JOHN W. BURNETT, JR.
 2250 Third and Juniper Streets
 San Diego 1, California.
Attorneys for Appellants.

FILED

SEP 21 1957

PAUL F. D. SMITH, CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

NO. 15612

CRESCENT WHARF & WAREHOUSE
COMPANY, a corporation, and PACIFIC
EMPLOYERS INSURANCE COMPANY, a
corporation,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Com-
missioner, United States Department of
Labor, Bureau of Employees' Compens-
ation, 13th Compensation District, and
WILLIAM LASCHE,

Appellees.

**BRIEF FOR APPELLANTS CRESCENT
WHARF & WAREHOUSE COMPANY &
PACIFIC EMPLOYERS INSURANCE
COMPANY**

JURISDICTIONAL STATEMENT

This case arose upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U. S. C. A., Sec. 901 et seq.

Jurisdiction of the District Court for the Southern District of California, Southern Division was obtained by the provisions

of Section 921 (b) of said Act, Title 33 U. S. C. A., which provides:

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred . . ."

This appeal from the final judgment of dismissal of the within action by the District Court below is taken pursuant to the provisions of Section 1291, Title 28, U. S. C. A., which provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the Southern District of California, Southern Division, Honorable Jacob Weinberger, District Judge, wherein judgment was entered on April 19, 1957, denying plaintiffs' (appellants herein) motion for substitution of party defendant nunc pro tunc; granting defendants' (appellees herein) motion to dismiss the suit, and the order that the suit be dismissed.

The complaint was filed November 16, 1954 for the purpose of judicially reviewing certain compensation orders made by Deputy Labor Commissioner Warren H. Pillsbury of the 13th Compensation District, Bureau of Employees' Compensation, United States Department of Labor. Said order reaffirmed a prior compensation order made by Deputy Labor Commissioner Albert J. Cyr on May 17, 1951. This later order, and the industrial incident from which it arose, was the subject matter of prior liti-

gation and appellate review before this Court. See *Cyr v. Crescent Wharf & Warehouse Co.* (9th Cir., 1954), 211 F. 2d 454. The matter therein had been remanded to the deputy commissioner for further findings. The within complaint sought to obtain judicial review of the further findings and the compensation order that followed. In accordance with the express provisions of Section 921 (b) of said Act, plaintiffs applied for and obtained from the Court below a preliminary injunction against Deputy Commissioner Warren H. Pillsbury and William Lasche, the employee involved, from enforcing the provisions of the afore-said compensation order except the weekly disability payments to defendant Lasche in the amount of \$35.00 per week, pending judicial review of the within action.

On March 28, 1955, the matter came on for hearing before the Honorable Peirson M. Hall, District Judge. Judge Hall, after hearing argument of counsel and taking the matter under submission, issued an order remanding the case to the deputy commissioner for certain specific findings. This order was dated June 27, 1955. Thereafter, on August 2, 1955, pursuant to proper motion, Judge Hall ordered his order of June 27, 1955 vacated and the case resubmitted for decision. No decision was ever rendered by Judge Hall on the merits of plaintiffs' complaint for judicial review.

On February 25, 1957, defendant Pillsbury filed a motion to dismiss the complaint on the grounds that the action had abated against Pillsbury inasmuch as he had retired from public office on December 31, 1955 and was succeeded to office by Charles F. Hanson on February 9, 1956 and no order for substitution had been made within six months of when the successor Hanson had taken office.

Neither plaintiffs nor their attorneys had actual notice of the fact of Pillsbury's retirement or the appointment of his successor

to office until they were served with defendants' motion to dismiss on February 26, 1957. During the interim of the date of submission on August 2, 1955 and the date of defendant's motion to dismiss on February 26, 1957—a period of approximately one year and seven months—numerous inquiries had been made to the clerk of the court to ascertain the status of the matter and always the reply was that the matter was still under submission and a decision would be rendered in due time.

By stipulation of counsel, defendant's motion to dismiss was continued for hearing until March 18, 1957 and on March 14, 1957, plaintiffs filed a motion for substitution nunc pro tunc to August 4, 1956—a date within six months of when deputy commissioner Hanson had taken public office.

Both motions for dismissal and substitution were heard before the Honorable Jacob Weinberger, District Judge. Hearing and argument took place on March 18, 29, 1957, and the matters were taken under submission. On April 19, 1957, Judge Weinberger entered judgment denying plaintiffs' motion to substitute the successor deputy commissioner nunc pro tunc to six months of when he took office; the motion of defendant to dismiss the aciton was granted and judgment was so entered.

This appeal followed by plaintiffs from entry of final judgment.

SPECIFICATION OF ERRORS

- I. The trial court was in error in entering a dismissal because by Legislative decree of Congress, the proceedings herein are within the exclusive jurisdiction of Admiralty; rendering Rule 25(d) inapplicable.
- II. The trial court was in error in entering judgment of dismissal in that Rule 25(d) has the effect of a statute of limitations and as such constituted an improper invasion by the Supreme Court into the substitutive rights of appellants.

- III. The trial court was in error in applying Rule 25(d) to the proceedings herein in that Congress intended that the Longshoremen's & Harbor Workers' Compensation Act was a National compensation law and exempt from the rules of civil procedure.
- IV. The trial court was in error in entering judgment of dismissal in that a party defendant remained after the public officer Pillsbury was dismissed from the suit and the action should therefore not have been dismissed in its entirety.
- V. The trial court was in error in applying Rule 25(d) to the within proceedings in that the rule fails to specify any notice of fact of succession of public officers to party litigants and as such violates the "due process" clause of the U. S. Constitution.
- VI. The delay of decision on the merits by the trial judge below violated the due process clause of the U. S. Constitution.

SUMMARY OF ARGUMENT

Congress, in enacting the Longshoremen's and Harbor Workers' Compensation Act, provided that the Act was Maritime in nature. Federal decisions have interpreted the Act to be within the jurisdiction of the Admiralty side of the District Court. The Federal rules of civil procedure would therefore be inapplicable to proceedings for judicial review or enforcement of compensation orders under the Act.

The proper action for this court to follow in the present appeal is to vacate the judgment of dismissal entered by the court below; remand the case to the court below with directions that the suit be treated as a libel on the Admiralty side of the court and the court there to take the appropriate action under Admiralty rules and to dispose of the motions for substitution of appellants and motion for dismissal of appellees in conformance with said rules.

If the Federal rules of civil procedure do apply to the within proceedings, Rule 25 thereof has the effect of a statute of limitations and as such, constitutes an improper invasion by the Supreme Court into the substantive rights of appellants.

Inasmuch as the Longshoremen's Act is patterned after the New York Compensation Act, it seems evident that Congress intended that the Longshoremen's Act was meant to be a National compensation law and as such was exempt from the Federal rules of civil procedure.

The trial judge below erred in entering a judgment of dismissal of appellant's cause of action in that another necessary defendant, William Lasche, beneficiary of the compensation order herein, was still a proper party defendant. Defendant LASCHE did not join public officer Pillsbury in the motion to dismiss for want of timely substitution. The reason for abatement is that there is no proper party defendant to respond to judgment. There was such a defendant remaining herein after appellee Pillsbury's motion to dismiss had been granted.

Rule 25 is unconstitutional as violative of the "due process" clause of the Fifth Amendment of the U. S. Constitution in that no provision exists for notice to party litigant of when the 6 months period for substitution begins to run. Appellants are entitled to actual notice of such event in order that they shall have opportunity to present every available defense. Actual notice is intrinsic within the "due process" clause.

The holding under submission without a decision for a period of approximately one year and seven months by a trial judge below, decries from the traditional notion of fair play, equity and substantial justice, which principles are also implicit within the due process clause of the Fifth Amendment.

I

BY LEGISLATIVE DECREE, THE PROCEEDINGS HEREIN ARE WITHIN THE EXCLUSIVE JURISDICTION OF ADMIRALTY; RENDERING RULE 25(d) INAPPLICABLE.

Rule 81(a)(6) of the Federal Rules of Civil Procedure states that said rules “. . . apply to proceedings for enforcement or review thereof of compensation orders under the Longshoremen’s and Harbor Workers’ Compensation Act . . . except to the extent that matters of procedure are provided for in that Act.” It was on the basis of this Rule that the within action was labeled a “complaint” and the action filed on the law side of the District Court. Now, after extensive research into the matter, it is submitted that notwithstanding the provisions of Rule 81, proceedings to review compensation orders issued under the provisions of the Longshoremen’s and Harbor Workers’ Compensation Act fall within the exclusive admiralty and maritime jurisdiction of the District Court.

By the provisions of Section 2072, Title 28, U. S. C. A., Congress has delegated to the United States Supreme Court, power to promulgate rules for district courts. Section 2072 provides:

“The Supreme Court shall have the power to prescribe, by general rules . . . the practice and procedure of the district courts of the United States . . . in civil actions.

“Such rules shall not abridge, enlarge or modify any substantive right . . .”

By the similar provisions of Sections 2073, Title 28, U. S. C. A., Congress also delegated to the Supreme Court power to promulgate practice and procedure in admiralty and maritime cases. Congress thus recognizes complete separation of judicial

power between cases in law and cases in admiralty. Admiralty jurisdiction is separate and apart from jurisdiction at law, and has its own rules, methods and procedure. *Swanson v. Marra Brothers*, 328 U. S. 1.

One of the very first sections of the Longshoremen's and Harbor Workers' Compensation Act, Section 903, provides that the Act is maritime in nature and compensation is payable "only if the disability or death results from injury occurring upon the navigable waters of the United States . . ."

In the leading case of *Crowell v. Benson* 285 U. S. 22, Chief Justice Hughes wrote an opinion construing the Act to be within the admiralty and maritime jurisdiction of our federal system. In that case suit was brought to review and enjoin an award made by a deputy commissioner of the United States Employees' Compensation Commission—the same form of action as instigated in the case at bar. A motion to dismiss the action was denied by the District Court and the case was transferred to the admiralty docket. At 285 U. S. p. 39 Justice Hughes wrote:

"As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law applicable to matters that fall within its admiralty and maritime jurisdiction. (U. S. Constitution, Article III, sec. 2; *Nogueira v. New York*, N. H. & H. R. Co. 281 U. S. 128, 138); and the general authority of Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute." (citing cases)

Farther on in Chief Justice Hughes' opinion, he comments on the apparent novelty of the Act providing for injunctive proceedings under Section 921 (b) of the Act and at the same time having the rules of admiralty apply. At page 39 he states:

"The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate

means of enforcing the standards of the maritime law as defined by the Act (citing cases). By statutes and rules courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings (citing cases)."

There is also the further provision of Rule 81(a)(1) which unequivocally states that the Federal Rules of Civil Procedure ". . . do not apply to proceedings in admiralty." Thus, whether the rules of admiralty or of civil procedure apply to the within action becomes vital to appellants' survival of their cause of action where more than six months have expired since Pillsbury's successor took public office. Appellants know of no rule in admiralty which requires substitution of parties within six months of when they succeeded to public office, as is true at law and equity under Rule 25(d) of the Federal Rules of Civil Procedure. It has been held that admiralty is not bound by the strict rules of the common law, and not infrequently applies principles differing from those in other courts. *Atlantic Fruit Co. v. Red Cross Line* (D. C. N. Y. 1921) 276 Fed. 319, affirmed 5 F.2d 218; *The Wanata v. Avery*, 95 U. S. 600, 611. Thus, the common law rule that an action abates, in the absence of statute, upon the expiration of a public officer defendant's term of office and such action cannot be revived against his successor, would not apply in admiralty by operation of law. As far as appellant's research indicates, the point has not been treated in appellate decisions of our federal system.

The entire situation reaches this possible absurd result: If plaintiffs herein had ignored Rule 81(a)(6) and filed their action on the admiralty side of the District Court below, defendants' motion to dismiss for want of timely substitution would not have prevailed unless laches or some similar doctrine of law had been urged by defendants. Appellants cannot believe that our federal system can or will tolerate such gross inconsistent and inequitable

application of the Longshoremen's and Harbor Workers' Compensation Act.

Are appellants estopped from now urging that the matter herein is one of admiralty rather than law? Appellants think not. A very similar situation arose in a case before this Court in *Kobilkin v. Pillsbury* (9th Cir., 1939), 103 F.2d 667 in which the action was remanded to the District Court below with instructions that the action be treated as a libel. In that case an employee filed a claim under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and upon denial of his claim by Deputy Commissioner Pillsbury, the same commissioner as here, the employee brought suit in the District Court by a petition in equity to set aside the order of the deputy commissioner, invoking what is now Section 921(b) of the Act. From a decree of the district court granting a motion to dismiss, the employee appealed to this Court.

Judge Healy wrote the opinion and at 103 F.2d, p. 670 stated:

"Appellant (the employee) should have filed his petition as a libel on the admiralty side of the district court. See *Twin Harbor Stevedoring & Tug Co. et al v. Marshall et al.*, 9 Cir., 103 F.2d 513, this day dictated. The cause is remanded to that court with instructions to treat the petition as a libel, the motion to dismiss as an exception to its sufficiency (Admiralty Rule Sup. Ct. 27, 28 U. S. C. A. following section 723), and to enter a decree of dismissal. The decree is vacated with instructions to transfer to admiralty docket and decree a dismissal."

Judge Matheurs in a concurring opinion stated at pages 670-671:

"The suit was brought in the right court, but on the wrong side of the court. It was brought in equity. It should have been brought in admiralty. The Longshoremen's and Harbor Worker's Compensation Act is part of the maritime law

of the United States. The jurisdiction conferred by section 21 (b) is admiralty jurisdiction. (citing cases, including *Crowell vs. Benson*, supra).

"That the court may, in a suit under section 21 (b), issue an injunction, mandatory or otherwise, does not make the court an equity court or the suit an equity suit. Injunction may be issued in admiralty as well as equity. (citing *Crowell vs. Benson*, supra) By providing for injunction proceedings, Congress contemplated a suit *as* in equity (Id, 285 U. S. p. 63, 52 S. St. p. 297, 76 L. Ed. 598), but it did not contemplate a suit *in* equity. It did contemplate a suit in admiralty."

It is interesting to note that the *Kobilkin* decision was dated April 14, 1939. The new rule 81(a) (6) of the Rules of Federal Civil Procedure was ordered by the Supreme Court on December 28, 1939, but notwithstanding, it affirmed the holding of the *Kobilkin* case per curiam by an equally divided court on January 29, 1940. *Kobilkin vs. Pillsbury* (9 Cir. 1939), 103 F.2d 667, affirmed, 1940, 309 U. S. 619, 60 S. Ct. 465, 84 L. Ed. 983.

An excellent summation and attempt to resolve the foregoing apparent inconsistencies was set forth by this Court in *Rupert v. Todd Shipyards Corporation* (9th Cir., 1956) 236 F.2d 559, where this Court upheld the action of a district court judge in transferring, on his own initiative, a case to the admiralty side of the docket. The suit there was also one to review and enjoin enforcement of a compensation order of a deputy commissioner under the Longshoremen's and Harbor Worker's Compensation Act. The suit had been brought on the law side of the district court, as was done in the case at bar. Chief Judge Denman wrote the opinion of the Court and at 236 F.2d p. 560 stated:

"In *Crowell v. Benson*, 285 U. S. 22, 27, 49, 52 S. Ct. 285, 76 L. Ed. 598, the Supreme Court held that the District Court sitting in admiralty had jurisdiction of claims under the Act and could exercise the power of injunction where

required. In 1921, in *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259, 42 S. Ct. 475, 66 L. Ed. 927 a jury-tried common law suit brought by a seaman for damages from unseaworthiness of the vessel, the Supreme Court recognized the long established doctrine that common law suits on such rights in admiralty are within the jurisdiction of the District Court. That is to say, the District Courts could consider the claimed right either in admiralty or at common law.

"We do not agree with appellees' contention that in 1939 the district courts were deprived of their admiralty jurisdiction of claim under the Act and confined to mere common law suits on such claim by a rule of the Supreme Court making the Rules of Civil Procedure, 28 U. S. C. A., applicable to cases under the Act. Originally by some oversight the Civil Rules did not apply to civil suits under the Act but in that year they were made to apply by an amendment of the rules (Rule 81(a) (6), 28 U. S. C. A.)"

"Obviously such an amendment of the rules was necessary for common law actions, but it seems to us unreasonable to contend that the mere implementation of common law suits constituted an overruling of the law established in *Crowell v. Benson*, supra, that the Act created a right enforceable in admiralty.

"Shipyards cites nothing of the views of the committee drafting the amending rules supporting its contention and we can find nothing. Nor can we agree with Moores' unsupported footnoted dictum (Moores' Fed. Pract., Vol. 5, p. 289, footnote 4) that such a claim should be considered only on the civil side of the court."

As matters now stand, the Longshoremen's Act, by its own statutory provisions and as interpreted by the foregoing cases, created rights enforceable in admiralty. Rule 81(a) (6) states however that the Federal Rules of Civil Procedure apply as to enforcement or review of compensation orders under the Act. It could be argued that inasmuch as Rule 81(a) (6) is the most recent action by the Supreme Court, that the provisions of the

Rule should prevail over prior case law, the statutory language itself, or subsequent inferior case law. Appellants challenge the power of the Supreme Court to go that far in promulgating rules for district courts. Under the provisions of Section 2072, Title 28, U. S. C. A., such an extension of power by the Supreme Court would be a direct "abridgment, enlargement or modification" of the substantive law of the Act. As said in the *Rupert* case, *supra*, under the authority of *Crowell v. Benson*, the Act created "a right enforceable in admiralty." Appellants find no delegation of authority from Congress to the Supreme Court wherein the Court is given the express power to "abridge, enlarge, or modify" such rights as are created under the provisions of the Act. The function of rules of court is to regulate the practice of the court and facilitate the transaction of its business. It is submitted that a rule of court cannot enlarge or restrict jurisdiction, or abrogate or modify substantive law. Such a limitation applies to the rules prescribed by the Supreme Court for inferior tribunals, whether at law or in admiralty. *Washington-Southern Nav. Co. v. Baltimore, etc., Steamboat Co.*, 263 U. S. 629.

It is submitted that the better explanation of why Rule 81(a)(6) was adopted by the Supreme Court is set forth in the *Rupert* case decided by this Court. This Court stated in that opinion that "obviously such an amendment of the rules was necessary for common law actions." The Court then cited the *Carlisle* case, *supra*, as an example of a common law action wherein suit was brought by a seaman for damages from unseaworthiness of a vessel. Therein, it is submitted, lies the fundamental distinction between a common law action, as in the *Carlisle* case and the review action of the case at bar. The action herein was filed solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act. No common law action to do so exists. As such, the action should

have been filed on the admiralty docket of the district court and not the law side. It would therefore be proper to follow the action of this Court in the *Kobilkin* case, *supra*, and remand the within action to the District Court below with instructions to treat the matter as one in admiralty and follow the appropriate Rules of Admiralty in disposing of the motions which were before that Court.

II

RULE 25(d) HAS THE EFFECT OF A STATUTE OF LIMITATIONS AND AS SUCH, CONSTITUTES AN IMPROPER INVASION BY THE SUPREME COURT INTO THE SUBSTANTIVE RIGHTS OF APPELLANTS.

If it be the conclusion of this court that the within action is one not properly transferrable to the admiralty docket of the District Court, and that the Federal Rules of Civil Procedure, and in particular Rule 25(d), do apply—then appellants must at once attempt a successful distinguishment of *Snyder v. Buck*, 340 U. S. 15. This case held by a 5-4 decision that a suit by a naval widow against the paymaster general of the Navy abated on appeal where the paymaster defendant retired from public office and his successor was not made a party defendant within six months after taking office, as required by Section 11(a) of the Judiciary Act of 1925, 43 Stat. 936, 941.

Snyder v. Buck was decided November 13, 1950. Since that date, the holding of the case and its dictum have been the Waterloo of many an action wherein timely substitution of a public officer was not made. Undoubtedly counsel for Appellees will have such cases collected and will present them with macabre delight.

In *Snyder v. Buck* plaintiff, a naval widow, brought an action of mandamus to compel the sole defendant Buck, as Paymaster General of the United States, to pay death benefits due plaintiff under the provisions of Section 943, 34 U. S. C. A. Jurisdiction was alleged under the Tucker Act, 24 Stat. 505, as amended. The Tucker Act specifically confers original jurisdiction on district courts in any civil action or claim against the United States founded upon the U. S. Constitution or Act of Congress. Section 1346(a)(2), 28 U. S. C. A.

On January 30, 1948 judgment for the petitioner was entered by the District Court wherein the defendant was ordered to pay the death benefits due. On March 18, 1948 defendant Buck filed a notice of appeal. He had however, retired from the Navy and a successor was appointed to his public office as paymaster general. Neither party made any motion within six months to have the successor in office substituted on appeal. The issue of abatement was raised in oral argument before the Court of Appeals. The case was thereafter remanded to the District Court with directions to dismiss the complaint as abated. The Supreme Court held that in the absence of a necessary party the matter abated and the action of the Court of Appeals was proper.

There are several vital differences between the *Snyder* case and the case at bar. First of all, the Supreme Court construed and applied Section 11(a) of the Judiciary Act of 1925 and *not* Rule 25(d) of the Federal Rules of Civil Procedure. The reason for this is stated in footnote 2 of the Court's opinion, 340 U. S. at p. 17:

"(Section 11(a) of the Judiciary Act) was repealed as of September 1, 1948, 62 Stat. 992, 1000. It is argued that, since that date was the date on which the 6 months statutory period for substitution in this case expired and since the repealing Act preserved any rights or liabilities existing under any of the repealed laws (*id.*, 992), Section 11 gov-

erns this case. We need not reach the effect of the repealing Act. For the Court of Appeals during the period material to our problem had in force its Rule 28(b) which provided that abatement and substitution were governed by Section 11 of the 1925 Act."

While Section 11(a) of the Judiciary Act of 1925 and Rule 25(d) of the Federal Rules of Civil Procedure are nearly identical and have the same 6 month provision for substitution of a successor to public office, there is a very basic distinction between the two. Section 11(a) was promulgated as a statute by Act of Congress. 43 Stat. 936, 941. Rule 25(d), on the other hand, was promulgated by the United States Supreme Court. While the Rules may have the effect of a statute, there is a fundamental difference between an *Act* of Congress and an *order* of the Supreme Court. It is submitted, that Rule 25(d) as interpreted and applied by the Court below becomes in effect, a statute of limitations. Such a limitation, it is submitted, must be enacted by the legislature and is beyond the competence of the court to enact. *Perry v. Allen* (5th Cir., 1956) 239 F.2d 107. In the *Perry* case plaintiff taxpayer brought suit against Collector of Internal Revenue for recovery of taxes erroneously assessed and paid. The United States intervened. The District Court dismissed the action because the administrator for the deceased collector had not been substituted within the 2 year requirement of Rule 25(a) of the Federal Rules of Civil Procedure. The Court of Appeals reversed, holding that in the absence of a federal statute of limitations governing substitution within a specified time after the death of a party, a federal rule requiring such substitution within two years after death of the party could not operate as a statute of limitation. Such a limitation, as stated above, may be enacted solely by the legislature and not a court.

As stated in Moores Federal Practice, Vol. IV, p. 516:

“ . . . insofar as Rule 25 prescribes an absolute time period within which substitution must be made, as it does in subdivisions (a), (b), and (d), it operates in the nature of a statute of limitations, and would, therefore, seem to be invalid as an improper invasion of the field of substantive rights.”

If Rule 25 does have the effect of a statute of limitations the Rule again conflicts with Section 2072, 28 U. S. C. A., wherein Congress expressly provided that the Rules “shall neither abridge, enlarge nor modify the substantive rights of any litigants.” Congress by enacting this section clearly recognized the distinction between substantive law, creating rights and duties of litigants, and procedural or adjective law, prescribing the court practice, and means or method of administering substantive law. *Occidental Life Ins. Co. of Cal. v. Kielhorn* (D. C. Mich. 1951), 98 F. Supp. 288.

The effect of the judgment of dismissal by the Court below was to terminate any possibility of survival of the within statutory action for judicial review of a compensation order under the provisions of Section 921(b) of the Longshoremen's Act because of the supposed mandatory provisions for timely substitution under Rule 25(d). As the Rule was thus interpreted and applied, it became a substantive and not procedural question. The question of survival with respect to a cause of action created by an act of Congress is not procedural but is one which depends upon the substance of the cause of action. *Barnes Coal Corp. v. Retail Coal Merchants' Ass'n.* (4th Cir., 1942), 128 F.2d 645. See also, *Electropure Sales Corp. v. Anglim* (D. C. N. Y. 1937), 21 F. Supp. 451.

III

CONGRESS INTENDED THAT THE LONGSHOREMEN'S & HARBOR WORKERS' COMPENSATION ACT, AS A NATIONAL COMPENSATION LAW, SHOULD BE EXEMPT FROM THE RULES OF CIVIL PROCEDURE.

If Rule 25(d) does not apply to the within action because its six month period within which to substitute operates as a statute of limitation and is therefore substantive, an inspection must then be made of the Longshoremen's etc., Act for the specific provisions of survival. In *Snyder v. Buck*, 340 U. S. 15 at p. 21, the Court recognizes the principle that when a specific statute provides in some manner for a perpetuation of action by or against an incumbent or his privities in public office, an action does not abate upon the expiration of a party defendant's term of office.

The Longshoremen's Act is national in scope and provides for a Federal compensation system. *Parker v. Motor Boat Sales*, 314 U. S. 244. Section 939(a) of the Act places the responsibility of administering the Act upon the Secretary of Labor. The Secretary of Labor promulgates rules and regulations, establishes the compensation districts, appoints deputy commissioners, etc.

By Section 940(e) of the Act, 33 U. S. C. A., when a deputy commissioner ceases to act in his official capacity, all his official records and papers are transferred to his successor. That section states:

"If any deputy commissioner is removed from office, or for any reason ceases to act as such deputy commissioner, all his official records and papers and office equipment shall be transferred to his successor in office or, if there be no successor, then to the Secretary (of Labor) or to a deputy commissioner designated by the Secretary."

Section 919(g) of the Act allows deputy commissioners to inter-transfer claims between themselves. That section reads:

“At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or *taking such other necessary action therein as may be directed.*” (emphasis added)

By the provisions of Section 31.24, 20 Code Fed. Regs., the Secretary of Labor has given his unequivocal approval of transfer of cases between deputy commissioners. That section provides:

“At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Bureau, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or *taking such other necessary action therein as may be directed.*” (emphasis added)

The obvious interpretation appellants wish to place upon the foregoing sections is that they constitute a sufficient statutory decree from Congress that compensation claims and cases arising under the Act are perpetuated and automatically transferred from a deputy commissioner to his successor, and that a case on review before the district court becomes the successor's responsibility, without the necessity of formal substitution. As stated in *Ozawa v. United States*, 260 U. S. 178, 194:

“It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the *purpose* may not fail.”

Appellants submit also that the Longshoremen's Act was not contemplated by Congress to be within the purview of Rule 25(d) of the Federal Rules because it was enacted as a national compensation act patterned after the New York Workmen's Compensation Act. *Case v. Pillsbury* (9th Cir., 1945), 148 F.2d 392. Just as the New York and California Compensation Acts provide that the Act constitutes the exclusive remedy of the employee against the employer for industrial injuries—so does the Longshoremen's Act. See e.g., Section 905 of the Act, 33 U. S. C. A.:

"The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee, . . ."

Just as New York and California have provisions in their State Compensation Acts liberalizing procedure and rules of evidence—so does the Longshoremen's Act. See e.g., Section 923(a) of the Act, 33 U. S. C. A.:

"In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties . . ."

Appellants see no distinction in the argument they are now advancing (that the Longshoremen's Act is not within the purview of Rule 25(d) and the reasoning of the Court in *Acheson v. Fujiko Furusho* (9th Cir., 1954), 212 F.2d 284 where it was held that actions by persons claiming to have been denied rights as nationals of the United States, did not abate under Rule 25(d) for the reason, inter alia, that Section 903 of Title 8 U. S. C. A. (Nationality Act) did not apply to such Rules. In that case,

several separate actions were consolidated for purposes of decision. In one of the actions, *Ng Kwock Gee v. Acheson*, the District Court had adjudged that the plaintiff was not a national of the United States and the plaintiff filed notice of appeal while the Secretary of State, Dean Acheson, was in office. Subsequently, John Foster Dulles succeeded to the office of Secretary of State. Plaintiff did not make a motion for substitution within the required six months under Rule 25(d). A motion to dismiss the appeal was made by United States Attorney on the ground that the action had abated because of no timely substitution. The motion to dismiss on the ground that the matter had abated was denied and the motion to substitute granted even though more than six months had passed since the successor took office. In that decision this Court thoroughly sets forth the chronology of the forerunner of Rule 25(d) and the case law on the subject of abatement as to public officials. In holding that Section 903 of Title 8 U. S. C. A. does not come within the purview of Rule 25(d) the decision states at 212 F.2d at p. 292:

“We think the above review of cases after as well as before the Congressional enactments, show clearly that judges and legislators, in passing upon the subject of abatement of cases wherein government officers were parties were acting upon the impropriety and futility of going ahead where the judgment would not be effective. In no case is there any hint of or expressed reason for extending the abatement doctrine to actions wherein the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment. While the adjudication of the plaintiff as a national of the United States, under Section 903 of Title 8 U. S. C. A. would result in the cessation of the deprivation of the right or privilege which entitled the plaintiff to sue, it does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction.”

With respect to the preliminary injunction obtained against Pillsbury in the case at bar, appellants submit that it is in reality an injunction against any deputy labor commissioner from attempting to enforce the compensation orders or award that issued from the Bureau of Employees' Compensation, Department of Labor. The Bureau of Employees Compensation is, in effect, sui juris. There is privity between officers of the same department of government. *Sunshine Coal Company v. Adkins*, 310 U. S. 381. Undoubtedly the file herein was kept on active status by deputy commissioner Hanson after the retirement of Pillsbury. Perpetuation of all claims and cases from a retiring commissioner to a successor is provided for in both the Act and rules and regulations. As was stated in the *Acheson* case, 212 F.2d at pp. 287-288:

"It is not claimed by or for the former Secretary of State or the former Attorney General that any harm has come or will come to the government of the United States or any department thereof by reason of the delay in petitioning for the substitution of the successor of the resigned officials. And the record in each case shows conclusively that these cases have continued to be live in the Department of Justice and in the Department of State, and that they were current items of business in those departments though the changes in the heads thereof. There is no inequitable consideration involved which would result in injustice if the cases are held to survive."

Appellants can present no better argument than the foregoing quotation for reasons why the case at bar should be excluded from the provisions of Rule 25(d) which has been aptly described as "easily the poorest rule of all the Federal Rules." 41 Amer. Bar J. 43. Appellants concur.

IV

INASMUCH AS A PARTY DEFENDANT REMAINED AFTER PUBLIC OFFICER PILLSBURY WAS DISMISSED FROM SUIT, THE ACTION SHOULD NOT HAVE ABATED.

Appellants submit that the Court below should not have entered a judgment of dismissal of the entire action. The chief authority relied upon by the trial judge for granting appellee's motion to dismiss for want of timely substitution of a public officer was *Snyder v. Buck*, supra. The case, as previously noted, involved a situation where the public official, the paymaster general of the United States Navy, was the *only* defendant. In the case at bar, however, not only was Deputy Commissioner Pillsbury named as a party defendant, but also the employee and claimant, William Lasche, in whose favor the compensation orders had been made.

Defendant, William Lasche, was joined as a party defendant in the within action because under the Longshoremen's & Harbor Workers' Compensation Act he had rights of enforcement of a compensation order that had to be enjoined pending the outcome of the within action for judicial review. Defendant William Lasche joined the defendant Warren H. Pillsbury in filing their answer to the within action (Transcript of Record, p. 21).

Under Section 921(c), 33 U. S. C. A. of the Act defendant Lasche, as a beneficiary of a compensation award, could "apply for the enforcement of the order to the Federal District Court . . ." In Section 918(a) of the Act, the employee is empowered to take positive action following a compensation order and can apply for supplemental orders of enforcement if needed. By the provisions of Rule 19(b) of the Federal Rules of Procedure,

defendant Lasche could have been made a party defendant to the within action by order of the District Court if plaintiffs had so moved at a later time.

Therefore, even if appellees' motion to dismiss as to Pillsbury was properly taken and a dismissal properly entered as to the public official, the cause of action on file herein should have survived because of the remaining party defendant. It should also be noted that the motion to dismiss that appellee filed, was solely in behalf of defendant Pillsbury. Defendant Lasche did not join in such action. (Transcript of Record, p. 33)

The within action was one of judicial review of certain compensation orders. A preliminary injunction had been obtained against all defendants from attempting to enforce that order and award, pending judicial review. A hearing had been had on the merits and the matter had stood under submission for over a year and seven months when the motion to dismiss for failure to timely substitute the successor public official had not been made. For all practical purposes, the action was over; pending only a decision—which never came. Under such circumstances, it is submitted, the action should have survived until a decision was handed down. A proper party defendant remained even if the public official was dismissed from the suit.

The case of *Acheson v. Fujiko Furusho* (9th Cir., 1954), 212 F.2d 284, at p. 288 also discusses when abatement and dismissal should lie:

"... it is of some importance to keep in mind that abatement of a case usually follows, as of course, when there is no one to respond to a judgment which might be or has been entered in a case. When a case reaches that posture the futility of its continuing is evident, and it abates. No statute upon the subject is needed to authorize a court or judge to make an order to the effect that the case is no longer alive."

In the instant case defendant Lasche had statutory rights available to him against the appellants. The judgment which would have been entered on the merits would certainly have involved Lasche—he was the beneficiary of the compensation award. It wasn't futile to allow the action to continue to a decision, even though appellee's motion to dismiss as against the public official had been granted.

V

LACK OF NOTICE OF SUCCESSION TO PUBLIC OFFICE
IN RULE 25(d) VIOLATES THE "DUE PROCESS"
CLAUSE OF THE CONSTITUTION, THEREBY REN-
DERING THE RULE INAPPLICABLE TO THE WITHIN
SUIT.

Whatever may be the propriety of Rule 25(d) and its six month period in which to make substitution of a successor to public office, the rule has serious constitutional shortcomings. The most obvious shortcoming, in the opinion of appellants, is the Rule's bland circumvention of the "Due Process" clause of the Fifth Amendment, U. S. Constitution, U. S. C. A. Amend. 5., wherein no provision for notice is made for placing parties on notice as to when a public officer has been removed from office and his successor appointed and the six month period began to run.

The Rule provides that before "a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object." No where in the Rule, however, is there a similar provision that the successor, or retiring officer, shall give notice to other parties, of the fact of change

of incumbency. The "traditional notion of fair play and substantial justice" would decree such notice be given to adverse parties, or at the very least, notice "reasonably calculated to give . . . actual notice of the proceeding and an opportunity to be heard." *Milliken v. Meyer*, 311 U. S. 457, 463.

A party who has appeared in a legal proceeding should be entitled to *actual* notice, rather than constructive notice, or notice by publication. In re *Glenn-Colusa Irr. Dist.* (D. C. Cal. 1945) 62 F. Supp. 651. In the Glenn case petition for voluntary bankruptcy had been filed under the Bankruptcy Act, 11 U. S. C. A. Sec. 401-404. An interlocutory decree had been entered confirming a plan of composition. No notice of said interlocutory decree was ever received by a claimant or his attorneys who had filed proper proof of claim approximately 4 months before entry of decree. A motion by the claimant was filed to share pro rata in the composition, even though the turning in of certain bonds had not been done within the time fixed by the terms of the Interlocutory Decree. The affidavit supporting the motion revealed that the first notice of the entry of decree obtained by claimant's attorney was when he had a telephone conversation with the clerk of the court some 11 months after the decree was entered. The court held that the motion should be granted, as the bankruptcy court has equitable powers and "equity does not favor anything which amounts to a forfeiture." 62 F. Supp. at p. 652. The court further states:

"Furthermore, a party who has appeared in a legal proceeding should be entitled to actual notice, rather than constructive notice, or notice by publication."

None of the cases appellants have researched under Rule 25(d) have ever discussed the particular point raised herein (that there is a lack of due process for want of notice). A basic re-

quirement of the Constitution is the guarantee that appropriate notice of judicial action shall be given to the parties affected. As was said in *Simon v. Kraft*, 182 U. S. 427, 436, "The essential elements of due process of law are notice and opportunity to defend." This means that the parties shall have an opportunity to present *every* available defense. *State of Kansas, ex rel. Beck v. Occidental Life Insurance Co.* (C. C. A. Kansas 1938), 95 F.2d 935, Cert. denied, 59 S. Court 63, 305 U. S. 603.

In paragraph XI of plaintiff's complaint herein (Transcript of Record p. 14), appellants have alleged that the order of compensation and award issued by the Deputy Commissioners violated the Fifth Amendment to the Constitution wherein plaintiffs would suffer irreparable damage by being deprived of their property without due process of law and without reasonable or adequate means or remedy for the recovery thereof. There has been no determination as to the merits of that allegation. The deprivation of a citizen of his property without notice and opportunity to be heard amounts to the taking of his property without due process of law. *Clarksbury-Columbus Short Route Bridge Co. v. Woodring*, 89 F.2d 788, 790.

Appellants therefore contend that lack of notice of the fact of Pillsbury's retirement or the taking of office by his successor, Hanson, has resulted in the taking of appellant's property without opportunity to be heard and as such, violates the Fifth Amendment to the U. S. Constitution.

VI

DELAY OF DECISION BY TRIAL JUDGE VIOLATED DUE PROCESS CLAUSE OF CONSTITUTION.

As was set forth in the Statement of the Case, *supra.*, a hearing on the merits of Appellant's complaint was had on March 28, 1955, before the Honorable Pierson M. Hall, District Judge. After taking the matter under submission, Judge Hall, on June 27, 1955, issued an order remanding the case to the Deputy Commissioner for specific findings. Later, pursuant to stipulation of all counsel and proper motion, on August 2, 1955, Judge Hall vacated his order of remand of June 27, 1955, and the case was resubmitted for decision. No decision was ever served on appellants.

It was shortly after February 25, 1957, that appellant's received the unhappy motion of appellee to dismiss for want of timely substitution of Pillsbury's successor. This motion was approximately 1 year and 7 months after the matter had been submitted for a decision.

Appellants have scoured the Federal Rules exhaustively but to no avail for a provision similar to Sections 632, 664 of the California Code of Civil Procedure, which Sections provide that a trial judge must file his written findings and decision and judgment within 30 days of submission.

Section 632 of the California Civil Code of Procedure provides in part:

"In Superior Courts and Municipal Courts, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within 30 days after the cause is submitted for a decision."

Section 664 of the California Civil Code of Procedure pro-

vides in part:

"If the trial, in a Superior or Municipal Court, has been had by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately upon the filing of such decision; in Justice Courts, judgment must be entered within 30 days after the submission of the cause."

Apparently there is no similar provision of the above California sections in the Federal Judicial System. There should be. A rule similar to the above in the Federal Judicial System would have averted the headaches and needless burning of midnight oil that both counsel for appellants and appellees have expended herein. Appellants submit that a delay of one year and seven months after a matter is submitted for a decision is a far cry from traditional notions of fair play, equity and substantial justice. Equitable principles "do not favor anything which amounts to a forfeiture." In re *Glenn-Colusa Irr. Dist.* (D. C. Cal. 1945), 62 F. Supp. 651. Fair play and substantial justice are implicit in due process, *Milliken v. Meyer*, 311 U. S. 457. That appellants have been damaged by such delay in rendering a decision is obvious; perhaps inextricably so.

Appellants submit that such a lengthy delay before rendering a decision by the trial judge herein, an albeit, forgotten facts upon which to now render a just decision, also violates the due process clause of the Fifth Amendment, U. S. Constitution.

CONCLUSION

From the foregoing points and arguments, appellants respectfully submit that the action of the court below in entering a judgment of dismissal of appellants' cause of action was error. As firstly argued, after extensive research and studying of the provisions of the Longshoremen's & Harbor Workers' Compensa-

tion Act and the case law construing it, it is the opinion of counsel for appellants that jurisdiction of the District Court to review compensation orders of a Deputy Commissioner lies within the exclusive Admiralty jurisdiction of the court. If this be so, the court below was in error in applying Rule 25(d) to the within action. The rules of Admiralty and civil procedure are not interchangeable unless expressly so providing. Appellants are unaware of any Admiralty rule similar to Rule 25(d) requiring mandatory substitution of a public officer's successor within six months. In Admiralty therefore, the court below would have had some discretion in treating appellee's motion for dismissal. Nor are appellants estopped at this stage of the proceedings to insist that the within action is properly one of Admiralty and not law. The contention presents a jurisdictional question which is vital at any stage of the proceedings.

If the within matter is in fact one to which Rule 25(d) does apply, then at least two central questions are resolved. Firstly, as the Rule was applied by the court below, it became one of substantive law, having the effect of a statute of limitations. It is within the exclusive power of the Legislature and not the Supreme Court to promulgate substantive law. Therefore, the rule should not, albeit, cannot apply herein. Without the Rule and its mandatory 6 month period within which to substitute, the court below would have had some discretion in treating the various motions of the parties. Secondly, there is no provision in the Rule for notice to party litigants as to when the six month period begins to run. Due process requires such notice to party litigants.

Inasmuch as the Longshoremen's Act was patterned after the New York Compensation Act, and excludes application of ordinary rules of evidence or civil procedure, it seems evident that Congress intended the Act to be excluded from coverage of the Federal rules of civil procedure, which rules in fact were enacted

subsequent to the Act. Rule 25 would again simply not apply to the within action.

Finally, appellants urge the entire situation herein called for the trial court to exercise its equitable powers. The delay of approximately one year and seven months on the part of one of the trial judges in rendering a decision has proven to be a costly delay to appellants. This entire matter would not now be before this court had a decision been rendered within a reasonable time after submission. Such delay, appellants submit, is also deprivation of due process.

Appellants therefore respectfully submit that this proceeding should be remanded to the trial court below with instructions:

1. To vacate and set aside the judgment of the dismissal.
2. To order the matter placed on the Admiralty docket and treated as a libel and to treat appellee's motion to dismiss as an exception to its sufficiencies.
3. To deny appellee's motion as to the sufficiency of the libel.
4. To treat appellant's motion for substitution nunc pro tunc as a petition to substitute new party and to grant same.

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IN THE
United States Court of Appeals
For the Ninth Circuit

CRESCENT WHARF & WAREHOUSE COMPANY, ET AL,
Appellants

v.

WARREN H. PILLSBURY, ET AL., *Appellees*

On Appeal From the United States District Court for the
Southern District of California, Southern Division

BRIEF FOR APPELLEES

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 15612

CRESCENT WHARF & WAREHOUSE COMPANY, ET AL,
Appellants

v.

WARREN H. PILLSBURY, ET AL., *Appellees*

On Appeal From the United States District Court for the
Southern District of California, Southern Division

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This appeal presents the questions of whether the court below properly applied Rule 25(d) of the Federal Rules of Civil Procedure to a statutory proceeding to review a compensation order made by a deputy commissioner pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-50,¹ and

¹ This statute will hereafter be referred to as "the Act."

whether, regardless of the applicability of Rule 25(d), the court correctly held that the action had abated as a matter of law.

Appellees adopt appellants' Jurisdictional Statement and Statement of the Case which accurately set forth the facts relevant to these questions.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 25(d) of the Federal Rules of Civil Procedure provides:

(d) Public Officers; Death or Separation from Office. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Rule 81(a)(6) of the Federal Rules of Civil Procedure provides in pertinent part:

(6) These rules apply to proceedings for enforcement or review of compensation orders under

the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U.S.C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. * * *

SUMMARY OF ARGUMENT

Because of the failure to make a timely substitution of the deputy commissioner's successor in office, the district court was required to dismiss the action as abated. The Federal Rules of Civil Procedure are expressly made applicable to a proceeding against a deputy commissioner to review and set aside a compensation order issued under the Longshoremen's and Harbor Workers' Compensation Act, and under Rule 25(d) an action against a public officer can be continued and maintained after his separation from office *pendente lite* only if his successor is substituted within six months from the time he ceases to hold office. Admittedly, the requirements of the rule were not complied with in the instant proceeding. Although the right of action being enforced in this proceeding is maritime in nature, the suit can be brought on the civil side of the district court, and, under the decision of this Court in *Haddock v. Pillsbury*, the case must then be governed by the rules of civil procedure rather than the rules applicable to admiralty proceedings. While it is clear that the power to establish and revise the substantive maritime law is lodged exclusively in Congress and the federal admiralty courts, there is no constitutional restriction on the power of Congress to make admiralty causes of action concurrently enforceable in state courts and in federal courts on the civil side.

No exception to the general applicability of the Federal Rules of Civil Procedure is warranted with respect to Rule 25(d). Compensation orders can be judicially reviewed solely in injunction proceedings against the deputy commissioner. Since appropriate relief can be obtained only by compelling official action by a public officer, the applicability of the rule and its purpose is clear, regardless of how the review proceeding is characterized. That proceeding does not result in a simple declaration of status binding on all the world but places the defendant officer under a judicial command in relation to the operation of the judgment.

Rule 25(d) is not a substantive statute of limitations and hence is not beyond the power of the Supreme Court to prescribe the rules of practice and procedure governing cases in the district courts. The rule does not place a time bar on the enforcement of a right of action. In the instant case, that bar comes solely from the statute which created the right of action. The rule only places a time limit on a necessary procedural step, and not every provision which prescribes a period within which a procedural act is required or allowed to be done can be said to alter or affect "substantive" rights.

At any rate, if Rule 25(d) is either invalid or is not applicable to this proceeding, the judgment of dismissal must nevertheless be affirmed since the case would then be governed by the doctrine of abatement prevailing in the district courts prior to the adoption of the rule and the enactment of its predecessor statutes. This doctrine required abatement of an action to compel a public officer in regard to his official duties immediately upon the defendant's separation from office. The plaintiff was not permitted to substitute the suc-

cessor but was required to sue out a new writ against him, provided the cause of action was not then barred by the substantive statute of limitations. This doctrine is applicable to the instant case regardless of how the proceeding is characterized or which side of the district court is exercising jurisdiction.

ARGUMENT

I.

THE DISTRICT COURT CORRECTLY HELD THAT RULE 25(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS APPLICABLE TO STATUTORY REVIEW PROCEEDINGS UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

A. The Federal Rules of Civil Procedure Are Expressly Made Applicable to These Proceedings.

At the outset, it should be noted that Rule 81(a)(6) of the Federal Rules of Civil Procedure provides that "these rules apply to proceedings for * * * review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act * * *." There is thus no question that the Supreme Court intended that the rules would apply to the proceeding in the instant case. As originally promulgated, the rules inadvertently provided the contrary, but in 1939 the Court ordered an amendment, made effective in 1941, to put Rule 81(a)(6) in its present form. See 7 Moore, *Federal Practice* ¶¶ 81.06 [4], 86.02 [2]. The reason for the amendment was explained in the Advisory Committee's Report recommending the change, reprinted at 60 Sup. Ct. CLV-CLIX. Since § 921 of the Act provides for suits in equity to enjoin enforcement of compensation orders and suits to compel obedience to such orders, the old equity rules of procedure would govern such suits, rather than the new federal practice, if

Rule 81(a)(6) were allowed to remain in its original form (*e.g.*, *Montagna v. Norton*, 28 F. Supp. 997, 1000 (D. N.J.)). The Committee was of the view that this anomaly should be done away with, and the Supreme Court, by ordering the amendment, expressed its agreement.

Appellants' attempted explanation of the amendment cannot be supported (Br. pp. 13-14). The applicability of the Federal Rules to proceedings under the Act is clearly not limited to "common law actions," as distinct from review proceedings under § 921, since Rule 81(a)(6) expressly states that the rules shall apply to § 921 proceedings. As appellants point out, "the action herein was filed solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act." (Br. p. 13). Regardless of how that statutory review proceeding is characterized, the Federal Rules are made applicable in express terms.

Appellants misread the opinion of this Court in *Rupert v. Todd Shipyards Corp.*, 236 F. 2d 559, as supporting their explanation.² In the *Rupert* case, this Court held that proceedings under § 921 could be brought on the admiralty side of the district court as well as on the civil side and that the amendment to Rule 81(a)(6) was not intended to deprive the admiralty courts of their concurrent jurisdiction over such claims. In this Court's view, the amendment was simply intended to implement those suits which were brought on the civil side, but there is no warrant for concluding, as appellants do, that the Court was attempting a distinction between "common law actions" and such civil suits. The only distinction made was

² Further discussion of the *Rupert* case is made *infra*, pp. 9-10.

between civil review proceedings and those which were brought in admiralty. As to the former, the Federal Rules of Civil Procedure were made applicable by the 1939 amendment; the latter cases would continue to be tried in accordance with the rules established for other suits in admiralty.

Appellants' reliance on this Court's decision in *Kobilkin v. Pillsbury*, 103 F. 2d 667, affirmed, 309 U.S. 619, is equally misplaced for, as appellants note (Br. p. 11), the *Kobilkin* case was decided prior to the 1939 amendment to Rule 81(a)(6) and, therefore, at a time when the civil rules were expressly made inapplicable. The fact that the Supreme Court affirmed the decision after the 1939 amendment was ordered is of no significance since the amendment was not made effective until April 3, 1941, long after that litigation had come to an end. See 7 Moore, *Federal Practice* ¶ 86.02 [2]. Furthermore, it is unlikely that the amendment was intended to have a retroactive effect.

In short, the Supreme Court has made all of the civil rules of procedure applicable to the case at bar, which admittedly was brought on the civil side of the district court (Br. p. 7). There is no other possible interpretation of Rule 81(a)(6). Therefore, appellants' position depends on establishing that the Supreme Court exceeded its statutory or constitutional power in making such an application, or that for special reasons Rule 25(d) was not intended to be applied along with the other civil rules.

B. This Suit Admittedly Was Brought on the Civil Side of the District Court; Therefore, Under the Decision of This Court in *Haddock v. Pillsbury*, the Rules of Civil Procedure Must be Applied.

Appellants concede that the instant proceeding was brought as a complaint for injunction on the civil side of the district court and not as a libel in admiralty (Br. p. 7). They contend, however, as they must, that this procedure on their part was improper and that a review proceeding under § 921 of the Act can only be brought on the admiralty side of the district court since it involves the enforcement of an admiralty cause of action.

This contention is contrary to the decision of this Court in *Haddock v. Pillsbury*, 155 F. 2d 820, certiorari denied, 329 U.S. 719, which appellants do not cite. Under the *Haddock* case, review proceedings on the civil side of the district court are permissible and, when so brought, are governed by the rules of civil procedure. In that case, as in the instant one, a suit to set aside a compensation order and enjoin its enforcement was brought as a civil action. The judgment dismissing the complaint on the merits was entered in the civil docket in accordance with Rule 58 of the Federal Rules of Civil Procedure, and the time for noting an appeal began to run from that moment. The employer's notice of appeal was filed after the appeal period had expired under that procedure. The employer argued, as appellants do here, that a suit to review a compensation order was a suit in admiralty and that, accordingly, the judgment should not have been entered in the civil docket. This contention was rejected by this Court in a decision ordering that the appeal be dismissed. The Court held that, regardless of whether or not a compensation order is reviewable by

a libel in admiralty, it certainly could be reviewed in a civil action if the aggrieved party elected to do so and that in such a case, the suit must be governed by the rules of civil procedure. This Court recognized that, under settled doctrine, admiralty rights often are enforceable on either side of the district court and that, if the enforcement suit is brought as a civil action, it is governed by the civil rules. The Court noted that Rule 81(a)(6), as amended, expressly made those rules applicable to review proceedings under the Act.

In the same case, this Court further stated that it was unnecessary to decide whether review could also be obtained by a libel filed in admiralty. That question was subsequently answered in the affirmative in *Rupert v. Todd Shipyards Corp.*, *supra*, on which appellants rely. In the *Rupert* case, the employer sought to enjoin enforcement of a compensation award by a civil action filed in accordance with § 921(b) of the Act. The district court transferred the case to the admiralty side. Both parties acquiesced in the transfer, and the case was accordingly tried as a suit in admiralty. In the district court, the employer prevailed. The employee filed a notice of appeal eighty days after entry of the final decree. The employer moved to dismiss the appeal as untimely on the ground that the thirty day appeal period for civil actions, rather than the ninety day period for suits in admiralty, applied. This Court denied the motion to dismiss and held that the transfer of the case to the admiralty side of the court, coupled with the acquiescence of the parties therein, made the proceeding one in admiralty. The Court reaffirmed its earlier implication in *Haddock* that review proceedings could be brought on either

side of the court at the election of the party aggrieved by the compensation order. The employer's contention that Rule 81(a)(6) deprived the admiralty courts of their concurrent jurisdiction over these claims was rejected. But the Court certainly did not hold that under the Act, the admiralty jurisdiction was exclusive; it only held that admiralty suits are permitted and that the rules of civil procedure are not applicable if review is sought in that way.

We recognize that there is language in the concurring opinion of Judge Matheurs in *Kobilkin v. Pillsbury, supra*, expressing the view that suits to set aside compensation orders must be brought in admiralty and cannot be brought as suits in equity. It is significant that Judge Matheurs felt constrained to write a concurring opinion in order to express this view, evidently believing that it was not part of the majority's decision. At any rate, the later decision of this Court in the *Haddock* case dispels any doubt as to that view's lack of vitality as the law of this Circuit. And, as noted *supra* p. 7, it is significant that the *Kobilkin* case was decided prior to the 1939 amendment to Rule 81(a)(6).³

The history of the passage of the Longshoremen's and Harbor Workers' Compensation Act and the landmark decision of the Supreme Court in *Crowell v. Benson*, 285 U.S. 22, sustaining the Act's validity as there

³ It should also be noted that the view of the Advisory Committee which recommended the amendment conflicted with that of Judge Matheurs. The Committee's recommendation was based on the belief that review proceedings could be brought as suits in equity and that, in the absence of the amendment, such suits would be governed by the old equity rules. 60 Sup. Ct. CLVIII. See also the decision of this Court in *Northwestern Stevedoring Co. v. Marshall*, 41 F. 2d 28, 29.

interpreted, do not support appellants' contention that review proceedings under the Act are within the exclusive admiralty jurisdiction. In *Southern Pacific Co. v. Jensen*, 244 U.S. 207, the Supreme Court held that state workmen's compensation statutes could not constitutionally be made applicable to maritime injuries, which would be tantamount to state regulation of suits to enforce admiralty causes of action. The grant of admiralty and maritime jurisdiction to the federal courts in Article III of the Constitution, coupled with the "necessary and proper" clause of Article I, meant that Congress and the federal courts had the paramount power to fix and determine the national maritime law and that the states could not affect that law if to do so would work harm to the policy of uniformity underlying the grant of power to the federal government. Subsequently, in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, the Court held unconstitutional the congressional attempt to overrule the result in *Jensen*. The Court ruled that the substantive maritime law must be determined by either the legislative or judicial branch of the federal government and that this power could not be delegated by Congress to the legislatures of the states. Thus, even when state courts are permitted to enforce admiralty causes of action, they must be guided by a uniform federal rule and are not permitted to affect substantive rights.

Because of the gap which these decisions created in regard to maritime injuries, Congress passed the Longshoremen's statute. See Sen. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). In *Crowell v. Benson*, 285 U.S. 22, the validity of the statute was upheld. In that case, the suit to enjoin enforcement of a compensation order

was brought on the civil side of the district court and then transferred to the admiralty side. The Court sustained the jurisdiction of the admiralty court to determine the matter and held that Congress could properly invest it with the injunctive powers of a court of equity. But the Court did *not* hold that the jurisdiction to enforce the statute was exclusively in admiralty and could not be concurrently lodged in the federal courts on the civil side or in the state courts. The only requirement was that the substantive law be established either by Congress or by the federal admiralty courts; there was no constitutional restriction placed on the tribunals which Congress could designate in addition to admiralty for enforcement of that substantive law. That federal courts on the civil side have concurrent jurisdiction over review proceedings under the Longshoremen's statute is clearly the law of this Circuit. *Haddock v. Pillsbury, supra*; *Rupert v. Todd Shipyards Corp., supra*. There is nothing in the decision of the Supreme Court in *Crowell v. Benson* which is to the contrary.

The history of the Jones Act, 46 U.S.C. 688, and the decisions of the Supreme Court sustaining its validity, clearly establish that Congress can create this type of concurrent jurisdiction. In *Chelentis v. Luckenbach S. S. Co.*, 247 U.S. 372, a seaman brought suit against a shipowner to recover full damages for personal injuries caused by the negligence of a crew member. The suit was brought in a state court and removed to the federal court on the civil side on the ground of diversity of citizenship. The Court held that the seaman could not recover full indemnity since he was asserting an admiralty cause of action and his right in admiralty was limited to recovery for maintenance and

cure. This decision resulted in the passage of the Jones Act by which Congress extended to seaman the benefits of the Federal Employers Liability Act, under which the state and federal courts have concurrent jurisdiction. The validity of this statute and its grant of concurrent jurisdiction to state courts was upheld in *Panama R.R. Co. v. Johnson*, 264 U.S. 375, in which the Supreme Court rejected the argument that admiralty causes of action must be enforced exclusively in admiralty courts. The Court carefully distinguished between the exclusive federal power to alter the substantive maritime law and the determination of what tribunals would have jurisdiction to enforce that law. The only possible constitutional limitation is that the jurisdiction of the admiralty courts can not be entirely withdrawn, and the Jones Act was so interpreted in order to dispose of this difficulty. See also *Garrett v. Moore-McCormack Co.*, 317 U.S. 239.

In summary, this Court has held that suits to review compensation orders under the Longshoremen's Act can be brought on either the civil or the admiralty side of the district court and that this factor determines the rules of procedure to be applied in the particular action. The power of Congress to create this concurrent jurisdiction is clear from the decisions of the Supreme Court upholding the validity of this statute and the validity of the Jones Act. Therefore, appellants' characterization of the right of review as an admiralty cause of action does not sustain their contention that the proceeding is within the exclusive jurisdiction of admiralty, rendering Rule 25(d) of the Federal Rules of Civil Procedure inapplicable.

C. Since an Injunction Proceeding Against the Deputy Commissioner is the Only Method for Obtaining Judicial Review of a Compensation Order, Timely Substitution of the Commissioner's Successor in Office is Required.

Apart from their attack on the validity of Rule 25(d), appellants have advanced an additional reason why the rule should not be applied in a statutory review proceeding under the Act. In substance, they urge that this proceeding is not like the usual suit to enjoin a government official from exercising the powers of his office but is only a method for obtaining judicial review of an administrative order. The proceeding is analogized to civil suits brought for the declaration of nationality status in which this Court has held that Rule 25(d) does not apply.

This contention cannot be sustained, and the distinction between these proceedings and the nationality cases is clear. While it is true that the proceeding is brought to determine the validity of a compensation order, the fact remains that Congress has established as the only means for obtaining judicial review of such orders an injunction suit, mandatory or otherwise, against the commissioner making the award. Thus, the aggrieved party can have an order set aside only by obtaining coercive relief against a public officer. In such circumstances, the action to compel him to discharge his duty, or to refrain from doing so, abates when the official dies or retires from office. *Snyder v. Buck*, 340 U.S. 15. The history and purpose of Rule 25(d) demonstrate its applicability to the instant proceeding.

Rule 25(d) is the modern version of legislation originally adopted by Congress in 1899 (30 Stat. 822) in response to a suggestion of the Supreme Court in *United States ex rel. Bernardin v. Butterworth*, 169

U.S. 600. See H. R. Rep. No. 960, 55th Cong., 2d Sess. (1899). Prior to the 1899 statute, the history of writs sued out against federal officers to compel performance of official acts clearly established that the death, resignation, or expiration of the term of office of the defendant *pendente lite* compelled the action to abate and forced the plaintiff to sue out another writ against the new incumbent.

Almost ninety years ago, the Supreme Court, in a suit against a Secretary of the Interior, recognized that “[w]hen he resigned, of course the suit abated.” *The Secretary v. McGarrahan*, 9 Wall. 298, 313. This ruling was uniformly followed in all other cases reaching the Court which concerned the same question. *United States v. Boutwell*, 17 Wall. 604, 609; *Commissioners v. Sellew*, 99 U.S. 624, 626; *United States v. Schurz*, 102 U.S. 378, 408; *Thompson v. United States*, 103 U.S. 480, 484; *United States v. Chandler*, 122 U.S. 643; *United States ex rel. International Contracting Co. v. Lamont*, 155 U.S. 303, 306; *United States ex rel. Long v. Lochren*, 164 U.S. 701. And, as early as 1897, it was noted that the principle of abatement because of resignation from office had already “for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published.” *Warner Valley Stock Co. v. Smith*, 165 U.S. 28, 31.

The reason for the rule is that resignation from office means that the officer “no longer possesses the power” to perform the official act demanded of him. *The Secretary v. McGarrahan*, 9 Wall. 298, 313. Since his duty to perform that act “exists only so long as the office is held, the court cannot compel [him] to perform it after his power to perform has ceased.” *United*

States v. Boutwell, 17 Wall. 604, 608. In short, the rationale of the rule of abatement, which deprived a plaintiff of relief because of succession in office, was that the defendant officer's resignation rendered him powerless to perform the required official act. And since a judgment against an ex-officer directing him to perform the act would be futile and ineffective, the abatement or prevention of the continuation of the action would be warranted.

United States ex rel. Bernardin v. Butterworth, *supra*, was such a suit. It sought to compel the Commissioner of Patents to issue a patent. Obviously, this was the type of act the Commissioner could be forced to perform only as long as he held office. Consequently, in line with its earlier holdings in similar coercive relief cases, the Supreme Court abated the action on the Commissioner's death. At the same time, the Court suggested the need and desirability of a statute which would prevent abatement and allow an action, in which coercive relief was sought against an officer, to continue against his successor.

Soon thereafter, the 1899 statute was enacted allowing the continuation of an action after the incumbent officer's separation from office, provided a timely substitution was made. This statute was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U.S.C. 780 (1934 ed.)) which effected a substantial change. See *Snyder v. Buck*, *supra* at 19. The provision that no action should abate was eliminated and it was simply provided that an action could be continued against a successor in office if the requisite showing of necessity was made within the stated period. Thus, "the 1925 Act made survival of the action dependent on a timely substitution." (*Ibid.*).

This statutory rule was embodied in Rule 25(d) of the Federal Rules of Civil Procedure, with minor modifications. When the Judicial Code of the United States was revised in 1948, Section 11 of the 1925 Act was omitted from the revision for the stated reason that the same ground was covered by Rule 25(d). See H. R. Rep. No. 308, 80th Cong., 1st Sess. A. 239 (1948). Thus, the 1899 statute, its 1925 revision, and the present version appearing in Rule 25(d) all require substitution within the period fixed by the statute or rule whenever the action is one in which coercive relief is sought against the defendant officer.

Appellants rely on the decision of this Court holding that Rule 25(d) was not applicable to a suit brought to determine the plaintiff's nationality status. *Acheson v. Fujiko Furusho*, 212 F. 2. 284; accord, *Chew Yin v. Acheson*, 216 F. 2d 60 (C.A. 7); *Tom Wing Po v. Acheson*, 214 F.2d 661 (C.A. 10); *Lehmann v. Acheson*, 214 F. 2d 403 (C.A. 3). Such suits are authorized by statute to be brought by a person claiming to be a national and who has been denied a right of a national by any government department or agency. The action, brought against the head of the department or agency, is for a judgment by the court declaring the plaintiff's status. No order, mandatory or otherwise, is issued to the defendant officer. This Court held that substitution of the defendant's successor in accordance with Rule 25(d) was not required since the purpose of the rule was not applicable to such a proceeding. The rule applied "only when a governmental officer, a defendant in a case in which it was sought to compel him to do or not to do an act within the sphere of his duty, was separated from the office and he was therefore powerless to perform." 212 F. 2d at 289. There

was no reason to extend the rule, however, "to actions wherein the judgment merely adjudicates the nationality status of the plaintiff which, by the way, is as binding to the world as it is to the defendant officer who cannot be under any judicial command in relation to the operation of the judgment. * * * [I]t does not order and cannot constitute an order to the defendant as in mandamus, habeas corpus, or injunction." 212 F. 2d at 292.

In contrast to this type of proceeding, a suit to review a compensation order under § 921 (b) of the Longshoremen's statute is in the form of an injunction proceeding, mandatory or otherwise, brought against the deputy commissioner making the order. The order can be set aside only by a decree from the district court restraining him from enforcing it, and, of course, this is the type of relief which the appellants sought in the instant case (R. 15-16). The proceeding is for the enforcement of a claim which relates solely to a power attached to the office. Cf. *Snyder v. Buck*, *supra*. The district court can compel compliance with its decree only as long as the defendant commissioner is in office and able to perform the act which the court directs shall be performed. But the injunction, mandatory or otherwise, does not reach the office—it is a personal order to the defendant. Since the personal duty exists only as long as the office is held, the court cannot compel the defendant to perform it after his power to perform has ceased. It necessarily follows that upon his separation from office, the action must abate. *E.g.*, *Warner Valley Stock Co. v. Smith*, 165 U.S. 28.

The distinction between the nationality status cases and a suit to review an administrative order concerning

a compensation award was recognized and given effect in a recent decision of the Court of Appeals for the Third Circuit. *Poindexter v. Folsom*, 242 F. 2d 516. In that case, the plaintiff's claim for benefits under the Old Age and Survivors' Insurance Benefits Act had been denied by a referee and the Appeals Counsel of the Department of Health, Education, and Welfare. Her suit was brought as a statutory proceeding in the district court to review the administrative decision denying her claim. The proceeding is thus analogous to a review proceeding under the Longshoremen's statute, except the latter is expressly in the form of an injunction suit while the former is simply in the form of a "civil action" against the Secretary of the Department. The plaintiff had failed to substitute the Secretary's successor within the six-month period prescribed by Rule 25(d), and the Court of Appeals held that the action had abated notwithstanding a stipulation between the parties by which they had attempted to extend the period. The same court had followed the decision of this Court in the nationality status cases and had held that Rule 25(d) was not applicable to those suits. *Lehmann v. Acheson*, *supra*. But the court rejected the plaintiff's contention that a suit which is essentially one to obtain judicial review of an administrative order should be given like treatment. It recognized that while the purpose of the rule of abatement did not apply when only a declaration of status is sought, it did apply when the plaintiff seeks a direction to a public officer to compel him to do something or to refrain from doing something. The court declared (242 F. 2d at 519):

* * * While it may be argued that the plaintiffs seek here a declaration that Doris Poindexter has

the legal status of Jerome Poindexter's widow and that this would be analogous to a declaration of nationality, * * * a declaration by this tribunal or by the court below or by the referee in respect to Doris' status as Jerome's widow would not be such a determination as would stand against the world as would an adjudication of nationality. What the plaintiffs really seek here is a judgment which would direct the Secretary of the Department of Health, Education and Welfare to pay the plaintiffs benefits claimed * * *.

Similarly, what the appellants seek here is not a declaration of status but an injunction against the deputy commissioner restraining him from exercising his statutory power to enforce his order. The commissioner's separation from office requires abatement of the action because his retirement has rendered him powerless to insure that the official act sought to be restrained is not committed, and the court is necessarily without power to compel the defendant in this regard. In order for appellants to have obtained the relief which they seek, it was necessary for them to make a timely substitution of the commissioner's successor.

II

RULE 25(d) IS NOT A STATUTE OF LIMITATIONS AND WAS VALIDLY PROMULGATED PURSUANT TO THE SUPREME COURT'S POWER TO PRESCRIBE THE PRACTICE AND PROCEDURE OF THE DISTRICT COURTS

In Point I we have shown that the Federal Rules of Civil Procedure have been made applicable to review proceedings under § 921 (b) of the Longshoremen's and Harbor Workers' Compensation Act, at least when such a proceeding is brought on the civil side of the district court, and that no exception is warranted with respect to Rule 25(d) requiring that the successor of a public

officer be substituted within six months after the official's separation from office. We will now show, contrary to appellants' contention, that the Supreme Court's promulgation of a rule requiring substitution is valid and must be given effect.

Appellants have argued that Rule 25(d) operates as a statute of limitations and, as such, is invalid since it affects substantive rights. Appellants are, of course, correct that in prescribing the rules of practice and procedure to be followed in the district courts, the Supreme Court may not "abridge, enlarge or modify any substantive right * * * ." 28 U.S.C. 2072. It is also true that for most purposes statutes of limitation are considered to be "substantive" rather than "procedural" in nature. See *Guaranty Trust Co. v. York*, 326 U.S. 99. But it is perfectly clear that not every time limitation which is applicable to a law suit operates as a substantive statute of limitations. There are many time limits contained in any code of civil procedure which prescribe a period within which certain acts are required or allowed to be done, and inevitably these limits have an effect on a litigant's substantive rights. Thus, under the Federal Rules of Civil Procedure, a motion for judgment n.o.v. must be made within ten days after the reception of a jury verdict (Rule 50(b)), a motion to amend findings must be made within ten days after entry of judgment (Rule 52(b)), a similar time limit is placed on the motion for a new trial (Rule 59(b)) and the motion to alter or amend a judgment (Rule 59(e)), a motion to be relieved from a final judgment on certain grounds must be made within one year after entry of judgment (Rule 60(b)), and a record on appeal must be filed with the court of appeals within ninety days from the time

the appeal is taken (Rule 73(g)). Under Rule 6(b), none of these time periods can be enlarged by the district court, so that failure by a party to take timely action results in the particular remedy which the rule affords becoming unavailable to him. And it is apparent that ultimately this failure may determine the outcome of the particular litigation.

The effect of the time limits contained in Rule 25 for substitution of parties is no different from the effect of these other time periods in this regard. Failure to substitute within the prescribed time results in the loss of the right of substitution, but failure to make timely motions as prescribed also results in the loss of the particular relief sought. All of these rules differ from substantive statutes of limitations. The latter do not simply affect remedial procedures but put a limitation on the time within which a cause of action may be asserted. "Limitation, as used in such statutes, means a bar to the alleged right of the plaintiff to recover in the action created by or arising out of the lapse of a certain time after the cause of action accrued, as appointed by law." *Christmas v. Russell*, 5 Wall. 290, 300. In short, the statute of limitations extinguishes the claim and puts it to rest—it operates as a "statute of repose."

This distinction is illustrated by the claim which appellants have asserted in the case at bar. Their failure to make a timely substitution of the successor to the deputy commissioner who made the compensation order in question must result in the action abating as to that commissioner. But there is nothing in Rule 25 or any of the other rules of procedure which prevents appellants from instituting a new action against the successor in office from whom effective relief could

be obtained. They are prevented from doing so solely by virtue of § 921 (a) of the Longshoremen's Act which provides that a compensation order becomes final within thirty days after it is filed unless judicial relief is sought prior to that time. The statute of limitations on appellants' claim is thus contained in the same statute which created their right of action and not in any of the Federal Rules of Civil Procedure. The event which makes substitution necessary is the commissioner's separation from office and not any of the requirements of the rules. Rule 25(d) only requires that that substitution be made within six months. It is the substantive statute which prevents a new action from being instituted. Certainly, it cannot be argued that the Supreme Court is powerless to prescribe any time limitations in the rules of procedure, not grounded on a statutory basis, by virtue of the fact that those rules cannot alter substantive rights. But that is the effect of appellant's contention with respect to the time limits contained in Rule 25. That contention should be rejected for the simple reason that Rule 25 does not put a time bar on appellants' right of action but only requires that they perform certain acts within a particular time in the course of enforcing that right of action.⁴

⁴ Although there is language in the opinion of the Supreme Court in *Anderson v. Yungkau*, 329 U.S. 482, to the effect that the time limits in Rule 25 operate as a statute of limitations, the Court was not there concerned with the problem under discussion here, and that language should not be read out of context. That case dealt only with the question of whether the district courts had discretion to enlarge the Rule 25 time periods, and the Court held that the rule operated as a mandate to dismiss the action if it was not revived in time.

The decision of the Court of Appeals for the Fifth Circuit in *Perry v. Allen*, 239 F. 2d 107, supports appellants' contention, but

III

IF FOR ANY REASON RULE 25(d) IS NOT APPLICABLE TO THIS PROCEEDING, THE JUDGMENT OF DISMISSAL MUST NEVERTHELESS BE AFFIRMED, SINCE IN THE ABSENCE OF THE RULE THE ACTION ABATED IMMEDIATELY UPON THE DEPUTY COMMISSIONER'S SEPARATION FROM OFFICE

For the reasons stated, we believe that the district court correctly applied Rule 25(d) to this proceeding. However, regardless of the merit of appellants' attack on the validity of the district court's action, they nevertheless cannot succeed in their endeavor to avoid the result of the failure to substitute the deputy commissioner's successor as a party defendant.

If Rule 25(d) either is not applicable or cannot be given effect because of its invalidity, it is apparent that the case would be governed by the doctrine of abatement which prevailed prior to the adoption of the rule, and prior to the enactment of its predecessor statutes which have since been repealed. No other result is possible. There is no other rule of law which the court could apply. The Act of 1899, the Judiciary Act of 1925, and Rule 25(d) all had the effect of alleviating the strict rule of abatement which previously was settled doctrine. The statutes and the rule were designed for that very purpose. As we have noted, early in the history of writs sued out against federal officers to compel or restrain performance of official acts, it was established that the separation from office of the defendant official *pendente lite* compelled the action

in our view is wrong and should not be followed. It is, of course, true that all of the cases which have applied Rule 25 since the revision of the Judicial Code in 1948 impliedly sustain the validity of the rule. It should also be noted that in this Court's opinion in *Acheson v. Fujiko Furusho*, *supra*, in which the Court engaged in an elaborate discussion of the history of the rule, no question was raised by the Court with respect to its validity.

to abate and forced the plaintiff to sue out another writ against the new incumbent. See cases cited *supra*, pp. 14-17. And the action abated immediately upon the defendant's removal from office without an opportunity to continue the action against his successor by a substitution of parties, since the successor had to be afforded an opportunity to determine for himself whether or not the official act in question would be performed. It made no difference whether the plaintiff sought relief by a common law writ of mandamus or by a bill in equity for an injunction, mandatory or otherwise. *Miguel v. McCarl*, 291 U.S. 442, 452; *Warner Valley Stock Co. v. Smith*, 165 U.S. 28, 33. In either event, the plaintiff was seeking relief by compelling certain official action and, therefore, the purpose of the rule had equal applicability. Official action could not be compelled from a defendant who no longer possessed the power to respond to the court's decree, and no other defendant could be brought before the court in the same proceeding. In the absence of a contrary statute or rule of procedure, the same principle must be applied to the instant case.

While appellants do not deal specifically with this problem, it is apparent that they would attempt to answer it by reiterating their contention that the instant proceeding is within the exclusive jurisdiction of admiralty and that the common law rule of abatement, which does not permit revival of the action against a public officer's successor, would not apply in an admiralty proceeding (Br. p. 9). But, as we have already demonstrated *supra* pp. 8-13, this Court held in *Haddock v. Pillsbury*, *supra*, that suits to review compensation orders can be brought on the civil side of the district court, as well as the admiralty side, and that

when they are so brought, the proceedings are tried as civil cases. And the rule of abatement applies whether the action is at law for a writ of mandamus or in equity for an injunction. The premise of exclusive admiralty jurisdiction which underlies appellants' argument does not withstand analysis and is contrary to authority; their conclusion must fall with it.

Even if appellants are correct that the instant suit must be tried on the admiralty side, the rule of abatement would still be applicable as in a suit at common law. The doctrine of abatement is not unknown in admiralty practice. Under the general maritime law, as at common law, a right of action *in personam* to recover for personal injuries abated upon the death of the person injured. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371. If either party died, his personal representative could be substituted to prosecute or defend the action only if the cause of action survived by operation of law. See 2 Benedict, *Admiralty* § 357; cf., *Just v. Chambers*, 312 U.S. 383.

Of course, a contrary rule obtained if the proceeding were an *in rem* libel against a vessel. *The Lafayette*, 269 Fed. 917, 927 (C.A. 2). It is for this reason that the rule of abatement upon death of a party was often not applicable in admiralty cases. And for a similar reason, the rule of abatement of suits against public officers to compel official action would not be found in suits within the admiralty jurisdiction. In the absence of a statutory grant of power, admiralty courts do not have the power of equity courts to issue injunctions. *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 457-58. If a party seeks injunctive relief, he must turn to the state courts, or to the federal courts on the

civil side in a case of diversity of citizenship, and cannot look to the admiralty courts for this type of remedy even if the right of action being enforced is maritime in nature. See Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Columbia L. Rev. 259, 265. But it is clear that Congress can by statute invest admiralty courts with the power to issue injunctions, as it has done in the case of the Longshoremen's Act, and can "draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act." *Crowell v. Benson*, 285 U.S. 22, 49. When Congress confers equitable powers upon a court of admiralty and grants it power to issue an injunction, the usual rules of equity pertaining to the remedy are carried over into the admiralty court even though such rules do not usually apply in an admiralty suit. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207, 217-18. Thus, when admiralty courts are given the power to enjoin official action of public officers, the same rule of abatement upon separation of the defendant from office applies as it would in a suit in equity to obtain the same relief. This is so simply because the reason for the rule of abatement is equally present regardless of which side of the court is exercising jurisdiction. For the same reason, it has long been settled doctrine that the common law rule applied on the equity side of the court in an injunction proceeding as it did on the law side in an action for writ of mandamus. *Warner Valley Stock Co. v. Smith*, *supra* at 33.

IV

**APPELLANTS' REMAINING CONTENTIONS URGING REVERSAL
OF THE JUDGMENT BELOW ARE CLEARLY WITHOUT MERIT**

Appellants have advanced three reasons in addition to the matters discussed above in support of their argument that the district court's dismissal of the action was improper (Br. pp. 23-29). These contentions plainly lack substance and can be dealt with briefly.

1. The fact that appellants joined as a party defendant the employee whose injury was the subject of the compensation order in question does not save the action from abating for failure to substitute the deputy commissioner's successor. Under the statute, judicial review of a compensation order can be obtained only through an injunction proceeding against the deputy commissioner who made the order. There is no authority in § 921 for joining the employee as a defendant. The relief which appellants seek in this action cannot be obtained from him. As appellants have noted (Br. p. 13), this action was brought "solely and exclusively pursuant to the statutory authority to do so conferred by Section 921(b) of the Act," which contains the exclusive method for obtaining judicial review. The fact that the employee is empowered by § 921 (c) to apply to the district court for the enforcement of the compensation order does not change the fact that the statute only authorizes injunction suits against the commissioner to have the order set aside and its enforcement enjoined. It is true that as to the employee the action does not strictly abate, but since effective relief cannot be obtained from him, the suit against him alone does not state a claim for which relief can be granted and was, therefore, properly dis-

missed. *Warner Valley Stock Co. v. Smith, supra* at 35.

2. Appellants have argued further that the lack of a requirement in Rule 25(d) of notice of succession to public office renders the rule invalid as violative of the "due process" clause of the Fifth Amendment. We know of no principle of constitutional law which requires that a party be served with notice of the happening of all facts which might be relevant to the litigation. The cases which appellants rely on for this proposition only hold that a party's legal interests cannot be affected by a judicial or administrative proceeding unless he is given reasonable notice of the proceeding and an opportunity to be heard. No such lack of notice was involved in the instant case. And, of course, the same objection of lack of notice of succession to office is applicable to the common law rule of abatement which the federal courts have enforced since the beginning of our judicial history.

3. Finally, appellants complain of the fact that appellees' motion to dismiss on the ground of abatement was made one year and seven months after the case had been submitted to the trial judge for a decision on the merits, so that the six-month period of Rule 25(d) expired while the case was *sub judice*. While we sympathize with appellants' concern over this type of delay in decision, that fact is not material to the questions presented by this appeal and does not excuse appellant's failure to make the necessary substitution of parties. The reason for the case continuing to be in litigation at the time of the defendant's separation from office does not bear on the requirement of substitution, and this is true even if, as in *Snyder v. Buck*,

340 U.S. 15, the delay is due to continuing action on behalf of the defendant subsequent to his death or resignation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the court below dismissing the action as abated should be affirmed.

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No. 15613

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST NELSON MURRAY and CHARLOTTE AGNES
MURRAY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15613

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST NELSON MURRAY and CHARLOTTE AGNES
MURRAY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

On March 15, 1956, the Grand Jury for the Southern District of California returned an Indictment against the defendants, Ernest Murray, Charlotte Murray, Richard Schrier and Frank McCormick, naming as unindicted co-conspirators, Marion Glenn Goodrich, Shirley Schrier, Jesse Gonzales and Roy Lee. [Tr. of R. 1.]¹

The first Count of the Indictment charged that all the defendants conspired to smuggle psittacine birds from Mexico into the United States. The second Count of the Indictment charged that on February 1, 1956, all the defendants smuggled 42 psittacine birds into the United

¹Tr. of R. refers to the Clerk's Transcript of Record. R. T. refers to the Reporter's Transcript of Proceedings.

States from Mexico, in violation of 18 U. S. C., Section 545. Count Three charged that on or about February 1, 1956, all the defendants received, concealed and facilitated the transportation of said 42 birds. Count Four charged that on February 16, 1956, the defendants Ernest and Charlotte Murray smuggled 17 birds from Mexico to the United States. Count Five charged that on February 16, 1956, the defendants Murray received, concealed and facilitated the transportation of said 17 birds. (*Ibid.*)

The defendant Schrier entered a plea of guilty to all Counts of the Indictment, while the defendant McCormick pleaded guilty to a different charge in an Information, the Indictment being dismissed as to him. [R. T. 170-171.]

Jury trial began on October 2, 1956, as to the Murrays, and was concluded on October 5, 1956, by a verdict of guilty on all Counts as to each of the two defendants. [Tr. of R. 19.]

On October 15, 1956, the District Court sentenced Ernest Murray to two years' imprisonment on each of the Counts Two and Three, to run concurrently, and suspended imposition of sentence on Count One of the Indictment. [Tr. of R. 25.] Imposition of sentence as to Charlotte Murray was suspended. [Tr. of R. 26.] A timely Notice of Appeal was filed on October 18, 1956, by both defendants. [Tr. of R. 31.]

District Court had jurisdiction of the action under the provisions of U. S. C., Title 18, Sections 371, 545.

This Court has jurisdiction under the provisions of U. S. C., Title 28, Section 1291.

Statement of the Case.

Richard Carl Schrier is a drill operator who, as a sideline, had made three trips to Tijuana to smuggle psittacine birds prior to meeting appellant Ernest Murray. [R. T. 13.] Murray contacted him some time in December, 1956 [R. T. 155], and Schrier went to Murray's aviary in Whittier, California, to sell him some psittacines. [R. T. 4, 7, 11.] They met and conversed [R. T. 7] and Murray asked Schrier to obtain some Panama parrots for him. [R. T. 11-12.] This Schrier did the next day, after smuggling them from Mexico, whereupon he then sold them to Murray. [R. T. 14-15.] Upon the occasion of the sale of the Panamas, Murray asked Schrier if he would like to work for him, by smuggling psittacines from Mexico for \$150 a trip. [R. T. 8, 21.] This proposition was again broached to Schrier at his house the next day, whereupon he accepted. [R. T. 20, 135.]

Ernest Murray then made arrangements with a bird dealer in Tijuana, Jesse Gonzales, to have Schrier pick up birds on Murray's account. [R. T. 30-31, 121-122, 126.] Richard, and his wife Shirley Schrier, then made approximately 17 trips to Mexico for psittacine birds, being successful in their smuggling operations six or seven times. [R. T. 24.] On the six or seven occasions, Murray would inform the Schriers as to the type of birds desired and would give the Schriers money which they would give to Gonzales. The Schriers would obtain birds from Gonzales in Tijuana, smuggle them across the border and then take them to the Murrays' aviary in Whittier. [R. T. 24-27, 139.] On one occasion, Mrs. Murray advised the Schriers as to the best type of birds to buy. [R. T. 32-33, 138.]

On February 1, 1956, Schrier and his father-in-law, Frank McCormick, were arrested in Oceanside, California, and jailed for smuggling 41 psittacines. [R. T. 35-36.] Murray made arrangements with a San Diego bail bondsman Vic Buono² and advised Schrier to keep quiet. [R. T. 80, 142-143.]

Shirley Schrier and Marion Glenn Goodrich, a nearby neighbor of the Schriers, visited Richard Schrier in the San Diego jail a few days later, and upon their return to Long Beach, noticed a roadblock along the highway. [R. T. 72.] They then went to advise Murray about this, as he had a man named Roy Lee engaged in smuggling another load of birds from Mexico at that time. [R. T. 72-73.] This was done, and Goodrich later asked whether he might be able to take Schrier's place in Murray's "bird business." [R. T. 76.] Murray agreed that he could and advised him as to how to conduct a bird smuggling operation. [R. T. 77.] Mrs. Murray relieved his mind about being caught by stating:

"We have been in this business 18 years . . . We used to run birds seven days a week and we never got caught once in 10 years."³ [R. T. 78.]

Goodrich, Mrs. Schrier and the appellants had other conversations. [R. T. 143.] After one conversation wherein Mrs. Murray intimated that Mr. Schrier might be in danger if he talked to Customs agents, Goodrich and Mrs. Schrier went to the Customs Agency with their information. [R. T. 81-82, 144.] Subsequently, the two informants held other conversations with Ernest Murray,

²For a description of Buono's activities in bird smuggling, see *Duke v. United States*, F. 2d (C. A. 9, 1957).

³Not quite true. See *Murray v. United States*, 217 F. 2d 583 (C. A. 9, 1954).

including one which was recorded. [R. T. 82-83, 144; Ex. 1; R. T. 115, 150, 175.] Acting under directions of Customs agents, Goodrich and Mrs. Schrier took money from Murray, purchased psittacine birds in Mexico, and brought them back to Long Beach, where the Murrays took delivery, whereupon they were arrested. [R. T. 86-90, 239.]

Argument.

I.

Appellants Were Properly Convicted of Felonies.

Appellants complain that they were improperly subjected to the felony penalties of 18 U. S. C., Sections 371 and 545, for having conspired to smuggle and for having smuggled psittacine birds into the United States. It is argued that 42 C. F. R. 71.152(b) specifically regulates the importation of psittacines, and that punishment for a violation of that regulation is provided solely by 42 U. S. C., Section 271(a). Therefore, appellants contend that they should have been prosecuted and convicted only under the misdemeanor provisions found in 42 U. S. C., Section 271(a).

This is not a new contention for Mr. Murray, he having raised it before this Court in *Murray v. United States*, 217 F. 2d 583 (C. A. 9, 1954). The contention was rejected in that case as well as in *Steiner v. United States*, 229 F. 2d 745 (C. A. 9, 1956), cert. den., 351 U. S. 953. However, appellants urge that this point be reconsidered in light of *Berra v. United States*, 351 U. S. 131 (1956). This request was fulfilled in *Duke v. United States*, F. 2d (C. A. 9, 1957), wherein it was stated:

“The case of *Berra vs. United States*, 351 U. S. 131, has no pertinency upon this point.”

The *Duke* opinion contains a lucid analysis of the law applicable to psittacine bird smuggling, and is more than sufficient authority for the proposition that appellants were properly charged and convicted under 18 U. S. C., Sections 371 and 545.

II.

Co-conspirators' Testimony Was Properly Admitted.

Appellants next contend that testimony of various Government witnesses was improperly admitted. At the outset, it should be noted that Rule 18(2)(d) of this Court has not been followed with reference to this point, as neither the grounds urged at the trial for the objection nor the full substance of the admitted evidence has been quoted. Further, the requirement as to referring to the page of the transcript where the objections and the admitted evidence may be found has not been fully complied with. *Cf. Lee v. United States*, 238 F. 2d 341, 344 (C. A. 9, 1956).

As best as can be determined, however, appellants' contentions appear to be (1) that the testimony of the witnesses as to events happening after February 1, 1956 (the date the trial court instructed the jury the conspiracy ended), constituted "a narration of alleged past events, alleged admissions and declarations of alleged co-conspirators"; and (2) that since "all of Schrier's testimony (and that of his wife's) was given subsequent to the termination of the alleged conspiracy . . . these statements constitute extra judicial admissions for the purpose of establishing the elements of the alleged offenses."

Appellants' argument discloses a misunderstanding of terms such as "declarations," "admissions" and "extra-judicial." Where B, the co-conspirator of A, makes a statement to C during the course and in furtherance of a conspiracy, this statement, or "declaration," is binding upon A, and C may testify as to such declaration.

Lutwak v. United States, 344 U. S. 604, 617 (1953);

Krulewitch v. United States, 336 U. S. 440, 443 (1949);

Wolcher v. United States, 233 F. 2d 748, 751 (C. A. 9, 1956).

On the other hand, where B confesses to C the details of the conspiracy after his arrest, C may not testify as to such admission in the trial against A, since the courts rightly reason that B's statement was not made during or in furtherance of the conspiracy.

Krulewitch v. United States, 336 U. S. 440, 444 (1949);

Fiswick v. United States, 329 U. S. 211, 217 (1946);

Yokely v. United States, 237 F. 2d 455 (C. A. 9, 1956).

If Customs agents in the instant case had testified as to what the co-conspirators had told them concerning the Murrys, the point appellants advance might be in issue. However, this was not done. In other words, C did not testify below as to what B said about A. Instead, it was B (the co-conspirators) who testified as to their activities and conversations with Murray. We know of no rule of law which would forbid the co-conspirators Richard Schrier, Shirley Schrier, Marion Goodrich, and Jesse Gonzales from testifying as to the admissions appellants di-

rectly made to them. As was stated in *Smith v. United States*, 224 F. 2d 58, 60 (C. A. 5, 1955):

“Appellant, citing *Fiswick v. United States*, 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196, and *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790, apparently contends that a conspirator cannot testify against his co-conspirator, at least as to matters relating to the conspiracy. On just what basis this novel theory rests is difficult to divine. Certainly *Fiswick* and *Krulewitch* do not support it. Those cases merely restate the general principles of proof applicable to conspiracy. They stand for the principle that statements made by a conspirator during the conspiracy, in furtherance of the conspiracy, are admissible in evidence against all conspirators. Statements or confessions of one conspirator made after the conspiracy is ended are not admissible evidence against the other conspirators. *But this is not to say that a conspirator is incompetent to take the stand during the trial of the conspiracy charges and testify as to the activities of the various defendants on trial during the conspiracy.* See *On Lee v. United States*, 343 U. S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270.” (Emphasis added.)

Appellants also urge, that the testimony of Richard and Shirley Schrier constitute “extra-judicial admissions.” How sworn testimony in open court by witnesses subject to cross-examination can constitute extra-judicial admissions is never fully explained. In similar vein, appellants complain that the Schriers’ testimony was given subsequent to the termination of the conspiracy. Why this is important is equally mystifying. Appellants evidently desire a rule in criminal cases to the effect that the prosecution’s testimony must be given during the actual commission of the crime charged. Their desires should not be confused, however, with the state of the law.

III.

There Being No Evidence of Entrapment, It Was Proper Not to Instruct the Jury Thereon.

The final point on appeal is that the trial court erred by not granting an instruction on entrapment.⁴ Rule 18(2)(d) has not been complied with by appellants with respect to this point, as neither the refused instruction nor the grounds of the objection urged at the trial have been set out *totidem verbis*. Accordingly it would seem that this point need not be considered.

Lee v. United States, 238 F. 2d 341, 344 (C. A. 9, 1956) (and see cases cited at footnote 15 therein).

Should the Court desire to consider this point, its lack of substance is readily apparent. Appellants' brief is replete with conclusions such as "during the trial, it developed that strong evidence of entrapment by the Government existed" (Appellants' Br. p. 3); "it was planned to entrap the Murrays" (Appellants' Br. p. 20); "Goodrich . . . along with others, set out to entrap the Murrays" (Appellants' Br. p. 13); and "Marion Glenn Goodrich . . . Shirley Schrier, . . . and one Jesse Gonzales, undertook to entrap the Murrays." (Appellants' Br. p. 4; see also pp. 6 and 21.) However, no reference is made to the record where the support for such conclusionary assertions can be found (this being in violation of Rule 18(2)(e)), but the lack of reference is understandable. For example, let us look at appellants' declaration that Jesse Gonzales, together with others, set out to entrap the Murrays.

⁴The record shows that appellants objected to the omission of an instruction, but does not disclose what the instruction concerned. [R. T. 270-271; see also R. T. 217, lines 5-10.]

Gonzales met Murray in the first few days of January, 1956, and never saw him after that. [R. T. 125-126.] He sold psittacine birds to Richard Schrier, pursuant to an arrangement with Murray, but never sold birds to Shirley Schrier or Marion Goodrich, and indeed, never saw Goodrich before the trial. [R. T. 124-125.] Since even appellants do not contend that the alleged plan to entrap the Murrays did not originate until after February 1, 1956 (the date of Richard Schrier's arrest), it is difficult to determine how Gonzales could have been involved in the plan, since he sold birds only to Richard Schrier and only on or before February 1, 1956. Therefore, it would be interesting to know in more detail appellants' basis for contending that Gonzales set out to entrap the Murrays.

In order for entrapment to exist, the criminal design must originate, not with the accused, but in the mind of the government officers; only when an accused is lured into the commission of a criminal act by persuasion, deceitful representation, or inducement, is the government estopped from prosecution.

Sherman v. United States, 241 F. 2d 329, 332 (C. A. 9, 1957);

Trice v. United States, 211 F. 2d 513, 518 (C. A. 9, 1954).

Bearing this definition in mind, the evidence should be examined for any sign that appellants were lured into committing a crime by illegal means. All that can be shown on this matter is that Marion Goodrich asked Ernest Murray if he could work for Murray in the bird smuggling business. [R. T. 76.] Murray agreed, and he and Mrs. Murray gave Goodrich and Shirley Schrier instructions as to how to operate. [R. T. 77-78.] Be-

fore Goodrich and Shirley Schrier went to the Customs agents, these facts had happened:

1. Murray had hired Richard Schrier, at \$150 a trip, to smuggle psittacine birds from Mexico, and seven successful trips had been made. [R. T. 20-24.]

2. Immediately after Richard Schrier's arrest, Murray had another person by the name of Roy Lee attempt to smuggle psittacines. [R. T. 73-74.]

3. Mrs. Murray had stated that they had been in the bird smuggling business for 18 years, and further, that "We used to run birds seven days a week and we never got caught once in 10 years." [R. T. 78.]

After learning of the Murrays' implication, Custom agents instructed Goodrich and Mrs. Schrier as to certain matters, including the use of a Miniphone to record conversations of Murray, which were introduced into evidence. [Ex. 1; R. T. 115, 150, 175.] With the permission of Customs agents, Goodrich and Mrs. Schrier bought psittacine birds with appellants' money in Mexico and brought the birds back to Long Beach, where the Murrays took delivery. [R. T. 87-91.]

Nowhere does the record disclose that the criminal design to smuggle psittacines was put into the Murrays' minds by anyone except themselves. The cross-examination of the government undercover agents did not show illegal entrapment, and the Murrays themselves offered no evidence on this point. Thus the facts provide no basis for an instruction on entrapment. Only where the evidence on entrapment is conflicting should the jury be instructed on this subject.

Sherman v. United States, 241 F. 2d 329, 333 (C. A. 9, 1957);

Lufty v. United States, 198 F. 2d 760 (C. A. 9, 1952).

Where there is no such evidence, it is not proper to instruct the jury on entrapment.

United States v. Pisano, 193 F. 2d 355, 361 (C. A. 7, 1951);

United States v. Markham, 191 F. 2d 936, 937 (C. A. 7, 1951);

Hall v. United States, 46 F. 2d 461 (C. A. 4, 1931);

Swallum v. United States, 39 F. 2d 390, 393 (C. A. 8, 1930);

Kendjerski v. United States, 9 F. 2d 909, 910 (C. A. 8, 1926).

Consequently, the trial court correctly refused to instruct the jury on a question as to which there was no evidence.

Conclusion.

There being no error in the trial, the judgments of the District Court should be affirmed.

Respectfully submitted,

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No. 15618

United States
Court of Appeals
for the Ninth Circuit

RICHARD D. LEUSCHNER, Appellant,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation, and
UNITED STATES OF AMERICA,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

SEP 19 1957

PAUL F. D. BROWN, CLERK

No. 15618

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RICHARD D. LEUSCHNER, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In The United States District Court, Northern
District of California, Southern Division

Civil No. 35398

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation,
Defendant.

COMPLAINT

The United States of America, plaintiff herein, by the undersigned its attorneys, complaining of the First Western Bank and Trust Company, defendant herein, alleges:

1. The plaintiff, United States of America, is a corporate sovereign and body politic.

2. The defendant, First Western Bank and Trust Company, is a California banking corporation and has its principal place of business in the City of San Francisco, California, within the jurisdiction of this court.

3. This action is brought pursuant to the provisions of the Internal Revenue Code, Title 26, U.S.C., and particularly section 6332(b) thereof.

4. This action has been authorized by the Commissioner of Internal Revenue and approved by the Attorney General of the United States.

5. On July 22, 1955, there was served upon the

defendant a notice of levy pursuant to section-6331 I.R.C., thereby seizing all property, rights to property, monies, credits and bank deposits now in its possession and belonging to Richard D. Leuschner, and notifying the defendant that all sums of money or other obligations owing from it to the taxpayer were thereby levied upon and seized for the satisfaction of Internal Revenue taxes therein itemized, totaling in excess of \$207,000.00, and demand was thereby made upon it for the amount necessary to satisfy the liability set forth therein or for such lesser sum as it may have or be indebted to the taxpayer to be applied as a payment to his tax liability.

6. Defendant has in its possession, subject to levy, the sum of \$7,462.89 and will have from time to time further sums payable to the taxpayer, Richard D. Leuschner.

7. Final demand was served upon the defendant but it has failed and refused to surrender the property or rights to property levied upon.

8. The taxes which formed the basis for the levy were duly assessed and now outstanding against Richard D. Leuschner in an amount in excess of the funds now payable pursuant to the levy.

Wherefore, the plaintiff demands judgment against the defendant, First Western Bank and Trust Company

1. For the sum of \$7,462.89, plus the amount of any additional sums which may be due and payable

as a result of the levy upon the taxpayer's property held by the defendant during the pendency of this action.

2. Interest at 6% per annum from July 22, 1955, upon the amount payable to the taxpayer at that time and from the date payable for any amounts that became due the taxpayer subsequent to that time.

3. That the defendant be ordered to comply with the levy with respect to any further payments as they become due.

/s/ LLOYD H. BURKE,
United States Attorney,

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,

/s/ LEON YUDKIN,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

[Endorsed]: Filed April 13, 1956.

In The District Court of the United States, Northern District of California, Southern Division

Civil No. 35398

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,
Defendant.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,
Defendant and Third Party Plaintiff,

vs.

RICHARD D. LEUSCHNER and ERIDA LEUSCHNER REICHERT,
Third Party Defendants.

THIRD PARTY COMPLAINT

First Western Bank and Trust Company, defendant and third party plaintiff above-named, by leave of court first had and obtained, hereby joins Richard D. Leuschner and Erida Leuschner Reichert as necessary parties herein and as third party defendants herein, and alleges:

1. Plaintiff, United States of America, has filed a complaint herein against said First Western Bank and Trust Company, a copy of which is attached hereto marked Exhibit I.

2. Said First Western Bank and Trust Company

is a corporation authorized to and doing a banking and trust business under and by virtue of the laws of the State of California, with its principal place of business in San Francisco, California. Said Richard D. Leuschner and said Erida Leuschner Reichert reside within the Southern Division of the Northern District of California and this court has jurisdiction over the subject matter of this controversy and of the parties hereto.

3. Plaintiff United States of America seeks to recover in this action from said First Western Bank and Trust Company, as set forth in said complaint, the sum of \$7,462.89 and such additional sums as may be hereafter payable to Richard D. Leuschner by said First Western Bank and Trust Company.

4. Said First Western Bank and Trust Company does not have in its possession any sum payable to said Richard D. Leuschner and does not expect hereafter to have in its possession any sums payable to said Richard D. Leuschner except as hereinafter set forth.

5. Said First Western Bank and Trust Company, said Richard D. Leuschner and said Erida Leuschner Reichert are co-trustees under a trust agreement dated April 16, 1941, executed by Ida Denicke Leuschner.

6. Said Richard D. Leuschner is also a beneficiary under said trust agreement, which provides, in part:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer,

pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.”

7. Said co-trustees First Western Bank and Trust Company, Richard D. Leuschner and Erida Leuschner have in their possession a fund in the present amount of \$8,014.44 which is payable to and claimed by said Richard D. Leuschner, as such beneficiary, subject to the conditions set forth in Paragraph 6 hereof, which fund is the same fund plaintiff United States of America is seeking to recover herein from said First Western Bank and Trust Company.

8. Said First Western Bank and Trust Company claims no right, title or interest in said fund or any part thereof, except as one of said co-trustees, but cannot deliver said fund or any part thereof to plaintiff United States of America, to said Richard D. Leuschner and said Erida Leuschner Reich-

ert as said co-trustees, or to said Richard D. Leuschner as beneficiary under said trust agreement until the rights of the plaintiff United States of America and the rights of said Richard D. Leuschner and of said Erida Leuschner Reichert individually and as co-trustees have been finally adjudicated.

9. If plaintiff United States of America is entitled to recover said sum of \$8,014.44 or any part thereof from said First Western Bank and Trust Company, said Richard D. Leuschner and said Erida Leuschner Reichert are, and each of them is, liable to said First Western Bank and Trust Company to the full extent of any such recovery by said plaintiff United States of America from said First Western Bank and Trust Company.

Wherefore, said First Western Bank and Trust Company demands judgment against said Richard D. Leuschner and said Erida Leuschner Reichert for all sums that may be awarded or adjudged against said First Western Bank and Trust Company and in favor of plaintiff United States of America.

Dated: May 3, 1956.

/s/ CHRISTOPHER M. JENKS,

ORRICK, DAHLQUIST,

HERRINGTON & SUTCLIFFE,

Attorneys for First Western Bank and Trust Company.

[Note: Exhibit I, Complaint, is set out at pages 3-5 of this printed record.]

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF DEFENDANT FIRST WESTERN
BANK AND TRUST COMPANY

Defendant First Western Bank and Trust Company, in answer to the complaint herein, admits, denies and alleges as follows:

1. Admits the allegations set forth in paragraphs 1, 2 and 3 of said complaint.

2. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraphs 4 and 8 of said complaint, but denies that any sums are now payable from said First Western Bank and Trust Company pursuant to said levy or at all to plaintiff United States of America.

3. Admits that on July 22, 1955 there was served upon said defendant a notice of levy for taxes in an amount in excess of \$207,000.00 alleged to be due to plaintiff from Richard D. Leuschner and that a final demand was served on said defendant on April 5, 1956, but except as so admitted denies generally and specifically all allegations set forth in paragraphs 5 and 7 of said complaint.

4. Denies (except as hereinafter set forth) that said defendant now has or had on July 22, 1955 or at any time since then has had in its possession the sum of \$7,462.89, or any sum, or will have from time to time or at any time hereafter further sums payable to said Richard D. Leuschner. In this con-

nection said First Western Bank and Trust Company alleges that it is one of three co-trustees under a trust agreement dated April 16, 1941 executed by one Ida Denicke Leuschner, and that said Richard D. Leuschner and one Erida Leuschner Reichert are the other co-trustees under said trust agreement; that said Richard D. Leuschner is also a beneficiary under said trust agreement. Said three co-trustees did not have in their possession on July 22, 1955, jointly or separately, any funds payable to Richard D. Leuschner, but now have in their possession jointly but not in the possession of First Western Bank and Trust Company separately a fund in the amount of \$8,014.44 and probably will from time to time hereafter have in their possession, jointly but not separately, further funds payable to said Richard D. Leuschner subject to a condition set forth in said trust agreement, to-wit:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the

beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary."

5. Said fund now held by said co-trustees and all funds which may hereafter from time to time be received by said co-trustees payable to said Richard D. Leuschner are claimed by said Richard D. Leuschner as a beneficiary of said trust and adversely to the claim of plaintiff United States of America. Defendant First Western Bank and Trust Company as one of said co-trustees is entitled to and should receive the personal receipt of said Richard D. Leuschner as a condition precedent to the payment of said funds or any part thereof to said Richard D. Leuschner or to plaintiff United States of America for taxes alleged to be due from said Richard D. Leuschner.

As a Further and Separate Defense to Said Complaint and by way of a plea in abatement, First Western Bank and Trust Company alleges:

1. There is now pending in this Court Civil Action No. 35416 to which all persons interested herein, including the United States of America and said Richard D. Leuschner, are parties. Said action was originally filed on March 8, 1956, in the Superior Court of the State of California in and for the City and County of San Francisco, and said United States of America was made a party thereto by order of said Superior Court after due notice

to and without objection from said United States of America, which thereafter removed said action to this Court. Said action, said Civil No. 35416, involves the rights of all parties, including said United States of America, to any and all funds held by said three co-trustees now payable to said Richard D. Leuschner or which may hereafter become payable to said Richard D. Leuschner, and all proceedings in the present action should be stayed and abated pending final determination of said prior action, Civil No. 35416.

Wherefore, said First Western Bank and Trust Company demands plaintiff take nothing by reason of the complaint on file herein, and that it have judgment for costs of suit herein and such other and further relief as may be proper in the premises.

/s/ CHRISTOPHER M. JENKS,
ORRICK, DAHLQUIST,
HERRINGTON & SUTCLIFFE,
Attorneys for First Western Bank and Trust Com-
pany.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 4, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD-PARTY DEFENDANT
ERIDA LEUSCHNER REICHERT TO
THIRD-PARTY COMPLAINT

Erida Leuschner Reichert, third party defendant above named in answer to the third party complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs 1, 2, 3, 5, 6, 7 and 8 of the said third party complaint.

II.

Alleges that she is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraph 4 of the said third party complaint and for that reason denies the said allegations.

III.

Denies each and every, all and singular, the allegations set forth in paragraph 9 of the said third party complaint as the same apply to third party defendant Erida Leuschner Reichert.

Wherefore, said Erida Leuschner Reichert demands that the third party plaintiff take nothing by reason of the third party complaint on file herein and that she have judgment for costs of suit herein

and such other and further relief as may be proper in the premises.

SLACK AND ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Third Party Defendant Erida
Leuschner Reichert.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD-PARTY DEFENDANT
ERIDA LEUSCHNER REICHERT TO
ORIGINAL COMPLAINT

Third Party Defendant, Erida Leuschner Reichert, in answer to the original complaint herein admits, denies and alleges as follows:

I.

Admits the allegations set forth in paragraphs 1, 2 and 3 of the said original complaint.

II.

Alleges that she is without knowledge or information sufficient to form a belief as to the truth of any of the allegations set forth in paragraphs 4, 5, 7 and 8 of the said original complaint but admits that she has been informed and believes and therefore alleges that said United States of America served some sort of a notice of levy upon the above

named First Western Bank and Trust Company pertaining to any credits or moneys belonging to the above named Richard D. Leuschner.

III.

Alleges that she is with said First Western Bank and Trust Company one of three co-trustees under a trust agreement dated April 16, 1941, executed by one Ida Denicke Leuschner and that the said Richard D. Leuschner is also a co-trustee under the said agreement; that the said Richard D. Leuschner is also a beneficiary under said trust agreement; that said co-trustees did not have in their possession on July 22, 1955, jointly or severally, any funds payable to Richard D. Leuschner but now have in their possession jointly as such co-trustees a fund in the amount of approximately \$8,014.44 and probably will from time to time thereafter have in their possession jointly as such co-trustees further funds payable to said Richard D. Leuschner subject to a condition set forth in said trust agreement, to-wit:

“Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary here-

under be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.”

IV.

Said fund now held by said co-trustees, as such co-trustees, and all funds which may hereafter from time to time be received by said co-trustees as such co-trustees are claimed by said Richard D. Leuschner as a beneficiary of said trust and adversely to the claim of plaintiff United States of America. Defendant Erida Leuschner Reichert as one of said co-trustees is entitled to and should receive the personal receipt of said Richard D. Leuschner as a condition precedent to the payment of said funds or any part thereof to said Richard D. Leuschner or to plaintiff United States of America for taxes alleged to be due from said Richard D. Leuschner.

As a Further and Separate Defense to Said Complaint and by way of a plea in abatement, said Erida Leuschner Reichert alleges:

1. There is now pending in this court Civil Action No. 35416, to which all persons interested herein, including the United States of America, Richard D. Leuschner and First Western Bank and Trust Company, are parties; said action, Civil Ac-

further ground that, as trustee and beneficiary of the aforementioned trust, he will or may be bound by a judgment in this action while the representation of his interests by the present defendant may not be adequate.

Richard D. Leuschner bases his motion on the further ground that there is pending in this court another suit involving the same subject matter as this action, and that intervention herein will enable the court to decide all questions of law and fact in the two suits and finally to determine the rights of all the parties thereto.

Dated: May 2, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Applicant for
Intervention.

Notice of Motion

To plaintiff United States of America and to Messrs. Lloyd H. Burke, Charles Elmer Collette and Leon Yudkin, its attorneys, and to defendant First Western Bank and Trust Company, a California Banking Corporation, and to Messrs. Orrick, Dahlquist, Herrington & Sutcliffe, its attorneys:

Please Take Notice that the undersigned will bring the above motion on for hearing before the Presiding Judge of this Court at Room 256 Post Office Building, San Francisco, California, on Monday, the 21st day of May, 1956, at 9:30 A.M. of that day, or as soon thereafter as counsel can be

heard. A draft of the Order proposed is attached.

Dated: May 3, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Applicant for
Intervention.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35398.]

ORDER PERMITTING INTERVENTION

Upon the application of M. Mitchell Bourquin and George DeLew, attorneys for applicant for intervention in the above entitled action, and good cause appearing therefor:

It Is Hereby Ordered that Richard D. Leuschner is granted leave to appear in the above entitled action as Intervenor.

Dated: May 21, 1956.

/s/ EDWARD P. MURPHY,

United States District Judge.

[Endorsed]: Filed May 21, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF RICHARD D. LEUSCHNER,
INTERVENOR

Comes now intervenor Richard D. Leuschner and admits, denies and alleges as follows:

I.

Admits all of the allegations contained in paragraphs I, II, III, IV, VII and VIII of plaintiff's complaint.

II.

Admits that a notice of levy was served upon defendant First Western Bank and Trust Company, a California banking corporation, and that said defendant was notified of the matters and things as therein set forth, and that demand for the sums was made, all as alleged in said complaint, and except as so expressly admitted, denies each and every, all and singular, the remaining allegations therein contained.

III.

Denies each and every, all and singular, the allegations contained in paragraph VI of plaintiff's complaint, and denies that said defendant has in its possession the sum of \$7,462.89, or any sum or at all.

Second Defense

I.

Alleges that defendant First Western Bank and

Trust Company, a California banking corporation, is one of three trustees of the trust created by Ida Denicke Leuschner, and that the sums of money referred to in plaintiff's complaint are held by said defendant in its capacity as trustee, and not individually, and that its possession of said sums is the possession of the three trustees, viz.: First Western Bank and Trust Company, Richard D. Leuschner, intervenor herein, and Erida Leuschner Reichert, and that no levy or notice of levy's has ever been served upon said trustees.

II.

Alleges that the aforesaid trust created by Ida Denicke Leuschner is one created to receive the rents, issues and profits of real and personal property within the meaning of §859 of the Civil Code of the State of California; that said trust contains so called "spendthrift" provisions providing that all of the proceeds thereof be paid only to the beneficiaries thereof and to no one else, and that said beneficiaries shall have no right to alienate or transfer their interests therein, nor shall said trust, or any of the proceeds thereof, be subject to any claims of creditors, nor may the interests of any such beneficiaries be transferred or made payable to any other person, firm, corporation or entity.

III.

Alleges that intervenor is one of the beneficiaries of said trust, and that all of the sums otherwise payable to him under the terms of said trust are necessary for his support within the meaning of

§849 of the Code of Civil Procedure of the State of California.

Wherefore, intervenor prays that plaintiff take nothing by its said complaint, and that this action be dismissed as to all parties, and that intervenor have judgment for his costs.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Intervenor.

[Endorsed]: Filed May 23, 1956.

[Title of District Court and Cause No. 35398.]

ANSWER OF THIRD PARTY DEFENDANT
RICHARD D. LEUSCHNER

Comes now Richard D. Leuschner, joined herein as third party defendant and, in answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company, admits, denies and alleges as follows:

First Defense to Complaint of Plaintiff

That the complaint fails to state a claim against defendant First Western Bank and Trust Company, a California banking corporation, upon which relief can be demanded.

Second Defense to Complaint of Plaintiff

I.

Admits that a notice of levy was served upon defendant First Western Bank and Trust Com-

pany, a California banking corporation, and that it was notified of the matters and things set forth in paragraph 5 of plaintiff's complaint and, except as expressly so admitted, denies each and every, all and singular, the remaining allegations therein contained, and alleges that no warrant of distraint was ever made, issued or served on it.

II.

Denies each and every, all and singular, the allegations contained in paragraph 6 of plaintiff's complaint, and denies that defendant First Western Bank and Trust Company, a California banking corporation, has in its possession the sum of \$7,-462.89, or any sum or at all, and denies that said banking corporation will, in the future, have any funds in its possession payable to this answering third party defendant.

Third Defense to Complaint of Plaintiff

I.

Alleges that defendant and third party plaintiff First Western Bank and Trust Company, a California banking corporation, is one of three trustees of the trust created by Ida Denicke Leuschner, and that the sums of money referred to in plaintiff's complaint are held by said bank in its capacity as trustee, and not individually, and that its possession of said sums is the possession of the three trustees, viz., First Western Bank and Trust Company, Richard D. Leuschner, third party defendant herein, and Erida Leuschner Reichert, and that

no levy or notice of levy has ever been served upon said trustees.

II.

Alleges that the aforesaid trust created by Ida Denicke Leuschner is one created to receive the rents, issues and profits of real and personal property within the meaning of §859 of the Civil Code of the State of California; that said trust contains so called "spendthrift" provisions providing that all of the proceeds thereof be paid only to the beneficiaries thereof and to no one else, and that said beneficiaries shall have no right to alienate or transfer their interests therein, nor shall said trust, or any of the proceeds thereof, be subject to any claims of creditors, nor may the interests of any such beneficiaries be transferred or made payable to any other person, firm, corporation or entity.

III.

Alleges that this third party defendant is one of the beneficiaries of said trust, and that all of the sums otherwise payable to him under the terms of said trust are necessary for his support within the meaning of §849 of the Code of Civil Procedure of the State of California.

First Defense to Third Party Complaint

I.

Admits that defendant and third party plaintiff claims no right, title or interest in the fund of money here in issue, or any part thereof, and, except as so expressly admitted, denies each and every, all and singular, the remaining allegations contained

in paragraph 8 of the third party complaint of First Western Bank and Trust Company, a California banking corporation.

II.

Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 9 of the third party complaint, and denies that Richard D. Leuschner is or will be liable to the First Western Bank and Trust Company, a California banking corporation, under any of the circumstances mentioned in said third party complaint, or in any capacity, or for any amount whatsoever.

Second Defense to Third Party Complaint

This answering third party defendant incorporates at this place by reference all of the allegations contained in paragraphs I, II and III of the Third Defense to Plaintiff's Complaint, as hereinabove set forth.

Wherefore, third party defendant Richard D. Leuschner prays that plaintiff United States of America and defendant and third party plaintiff First Western Bank and Trust Company, a California banking corporation, take nothing by their complaint and third party complaint, and that this third party defendant be dismissed with his costs.

Dated: May 29, 1956.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Third Party Defendant Richard D. Leuschner.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 31, 1956.

[Title of District Court and Cause No. 35398.]

MOTION OF RICHARD D. LEUSCHNER TO
AMEND ANSWER

Richard D. Leuschner, third party defendant and intervenor, moves and applies to the court for an order permitting him to amend his answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company by filing an amendment to said answer, copy of which is attached hereto and by reference made a part hereof. This motion is based upon said amendment and on the records, papers and files in this action, and is made upon the ground that the allowance of said amendment will be in the interests and furtherance of justice.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

Notice of Motion

To plaintiff United States of America and to Messrs. Lloyd H. Burke, Charles Elmer Collett and Leon Yudkin, its attorneys, and to First Western Bank and Trust Company and to Messrs. Christopher M. Jenks and Orrick, Dahlquist, Herrington & Sutcliffe, its attorneys, and to Erida Leuschner Reichert, and to Messrs. John E. Troxel and Slack and Zook, her attorneys:

Please Take Notice that the undersigned will

bring the above motion on for hearing before the Presiding Judge of this court at Room 258 Post Office Building, San Francisco, California, on Wednesday, the 27th day of February, 1957, at 9:30 A.M. of that day, or as soon thereafter as counsel can be heard. A draft of the Order proposed is attached.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

[Note: Order Permitting Amendment and Amendment are set out at pages 29-31.]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Feb. 25, 1957.

[Title of District Court and Cause No. 35398.]

ORDER PERMITTING AMENDMENT TO ANSWER OF RICHARD D. LEUSCHNER

Upon the motion of M. Mitchell Bourquin and George DeLew, attorneys for third party defendant and intervenor Richard D. Leuschner in the above entitled action, and good cause appearing therefor,

It Is Hereby Ordered that Richard D. Leuschner is granted leave to amend his answer to plaintiff's complaint and to the third party complaint of defendant by filing an amendment to said answer.

Dated: February 27, 1957.

/s/ **GEORGE B. HARRIS,**
United States District Judge.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Cause No. 35398.]

**AMENDMENT TO ANSWER OF THIRD
PARTY DEFENDANT RICHARD D. LEU-
SCHNER**

Comes now Richard D. Leuschner, joined herein as third party defendant, and after leave of court first had and obtained files this, an amendment to his answer to plaintiff's complaint and to the third party complaint of defendant First Western Bank and Trust Company, and admits, denies and alleges as follows:

As an additional and fourth defense to the complaint of plaintiff, and as an additional and third defense to the third party complaint, this defendant alleges:

I.

That heretofore, in action No. 8450 on the records of the United States District Court for the Southern District of California, Northern Division, In the Matter of Richard D. Leuschner, Bankrupt, said court adjudicated this defendant a bankrupt. That in said action plaintiff United States of America filed its claim in the amount of \$339,260.63. That thereafter a trustee was duly and regularly ap-

pointed and petitioned said United States District Court to subject to the claims of creditors of this defendant, the aforesaid bankrupt, all of the proceeds of the trust created by Ida Denicke Leuschner, of which trust the First Western Bank and Trust Company is one of three trustees. That in said action said court made its final order refusing to subject said trust income to the payment of creditors' claims, including that of the United States of America, plaintiff herein, and said judgment has now become final. That this defendant alleges that the judgment of the aforesaid court upon the matters and things herein alleged by plaintiff is an adjudication of the issues herein raised and that plaintiff United States of America is estopped from herein asserting any claim to the funds of said trust herein sought, and that said judgment of the United States District Court for the Southern District of California, Northern Division, in the cause aforesaid, is a complete determination of the matters and things here under consideration, and plaintiff United States of America is barred from maintaining this action by reason of said adjudication.

Wherefore this defendant prays that plaintiff and third party plaintiff take nothing by their complaint and third party complaint and that this defendant be dismissed with his costs.

Dated: February 21, 1957.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Cause No. 35398.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective counsel of record, that the facts stated herein shall be taken to be true in the above proceeding and received in evidence therein; it being further stipulated and agreed that this stipulation shall be without prejudice to the right of any party to introduce additional evidence not contrary to or inconsistent with the facts herein stipulated to be true, and without prejudice to the right of any party to object to the materiality or relevance of any of the facts agreed to, which are as follows:

I.

On the dates shown below, the Commissioner of Internal Revenue or his duly authorized delegate assessed against Richard D. Leuschner, Federal Income taxes for the period and in the amounts set forth below. On the dates shown below, the assessment lists containing these assessments were received in the office of the District Director of Internal Revenue at San Francisco, California. Shortly after the receipt of each assessment list, notice and demand for the payment of each tax so assessed was duly made against the taxpayer, but despite the notice and demand for payment the taxpayer has paid, if any, only the amounts set forth below.

PERIOD	DATE OF ASSESSMENT	ASSESSMENT LISTS RECEIVED	AMOUNT OF ASSESSMENT	AMOUNT PAID	NOTICE OF TAX LIEN FILED	UNPAID BALANCE
me	1/4/52	1/ 7/52	\$62,979.84	0	6/ 6/52 7/21/52	\$62,979.84
me	1/4/52	1/ 7/52	66,273.27	0	6/ 6/52 7/21/52	66,273.27
me	1/4/52	1/ 7/52	31,133.54	0	6/ 6/52 7/21/52	31,133.54
me	2/8/52	2/11/52	13,783.74	2,477.21	8/ 7/52	11,306.53

II.

On July 22, 1955 a Notice of Levy (a true copy of which is attached to this stipulation) was delivered to a Trust Office or Assistant Trust Officer of the First Western Bank And Trust Company, San Francisco, California. On April 5, 1956 a Final Demand (a true copy of which is attached to this stipulation) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank And Trust Company, San Francisco, California.

III.

On the date of the delivery of the Notice of Levy described above the First Western Bank and Trust Company was and now is one of three co-trustees of a Trust created by Ida Denicke Leuschner. On the date of the delivery of the Notice of Levy described above Richard D. Leuschner was and now is one of the beneficiaries of the Trust created by Ida Denicke Leuschner. In connection with the administration of the aforesaid trust all receipts of income attributable to this trust were deposited in a commercial account containing deposits of trusts being administered in whole or in

part by the First Western Bank and Trust Company. Payments to the beneficiaries of the Leuschner trust were made by checks drawn on this commercial account and signed by an officer of the Trust Department of the First Western Bank and Trust Company.

IV.

Payments to other beneficiaries of the Leuschner trust have been made and are being made in the manner set forth above but no payments have been made from said trust to Richard D. Leuschner since the delivery of the above mentioned Notice of Levy.

V.

The First Western Bank and Trust Company has refused and still refuses to pay any monies to the United States of America under the above mentioned Trust agreement but has been and is now willing to deposit said funds in Court.

VI.

If Richard D. Leuschner were called as a witness in this cause he would testify to the facts as set forth in the Affidavit of Richard D. Leuschner on file in this cause. (a true copy of said affidavit is attached to this stipulation)

Dated March 1, 1957.

LLOYD H. BURKE,
United States Attorney.

/s/ By LYNN J. GILLARD,
Attorneys for the United States.

M. MITCHELL BOURQUIN,

/s/ By GEORGE DeLEW,

Attorneys for Richard D. Leuschner.

CHRISTOPHER M. JENKS,

ORRICK, DAHLQUIST,

HERRINGTON and SUTCLIFFE,

/s/ by CHRISTOPHER M. JENKS,

Attorneys for First Western Bank
and Trust Company.

SLACK and ZOOK,

JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,

Attorneys for Erida L. Reichert.

Form 668-A
REV. JAN. 1935

S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

NOTICE OF LEVY

To: (Name of person holding property, moneys, etc., belonging to taxpayer)
Trust Officer, First Western Bank (Formerly San Francisco Bank) San Francisco, Calif.
Account Trust in which RICHARD D. LEUSCHNER is partial beneficiary.
 You are hereby notified that there is now due, owing, and unpaid from

NAME AND ADDRESS OF TAXPAYER **RICHARD D. LEUSCHNER, Sr., o/o Phillip M. Hershey,**
405 Montgomery St., Rm 1521, San Francisco, California.

to the United States of America the sum of

Two hundred Seven thousand Six hundred Sixty-five & 42/100 Dollars \$ **207,665.42**
 for Internal Revenue taxes, to wit:

PERIOD AND TYPE OF TAX	DATE OF ASSESSMENT	ACCOUNT NO.	UNPAID BALANCE	STATUTORY ADDITIONS	TOTAL
1943 IT XXXXXXXXXX	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 62979.84	\$ 13225.77	\$ 76205.61
1944 IT	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 66273.27	\$ 13917.39	\$ 80190.66
1945 IT	DAR 1 7 52	#1 4 52 SPL #3 OAP	\$ 31133.54	\$ 6538.04	\$ 37671.58
1947 IT	XXXXXXXXXX 2-11-52	DAR 52 FEB 3-519030	\$ 11306.53	\$ 2291.04	\$ 13597.57

Rate of interest 6% per annum.
 Plus statutory interest from 7-15-1955 to date paid. TOTAL AMOUNT DUE \$ **207,665.42**

You are further notified that demand has been made upon the taxpayer for the amount set forth herein, and that such amount is still due, owing, and unpaid from this taxpayer, and that the lien provided for by Section 6321, Internal Revenue Code of 1954, now exists upon all property or rights to property belonging to the aforesaid taxpayer. Accordingly, you are further notified that all property, rights to property, moneys, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized for satisfaction of the aforesaid tax, together with all additions provided by law, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth herein, or for such lesser sum as you may be indebted to him, to be applied as a payment on his tax liability.

Dated at _____ this _____ day of _____ 19____

DISTRICT DIRECTOR OF INTERNAL REVENUE *Raymond J. Lucchesi* TITLE Collection Officer in Charge. RECEIVED
Glenn T. Jamison Raymond J. Lucchesi
 CERTIFICATE OF SERVICE

I hereby certify that this levy was served by handing a copy of this notice of levy to
 NAME AND TITLE
94 APR 20 1956
DIST DIRECTOR INTERNAL REVENUE
SAN FRANCISCO

On _____, 195__ at _____ a.m. p.m. COLLECTION OFFICER (Signature)

Received
 MAY 1 1956
 Legal Division

Form 668-C

(REV. JAN. 1955)

U. S. TREASURY DEPARTMENT - INTERNAL

FINAL DEMAND

RECEIVED

DISTRICT

SAN FRANCISCO, CALIFORNIA

DATE

94 MAR 23 1956

TO: Trust Officer, First Western Bank (formerly San Francisco Bank), San Francisco, Calif.
 Trust account in which RICHARD D. LEUSCHNER, Sr., is a partial beneficiary

On July 22, 1955

D. J. Flynn, Asst. Trust Officer

there was served upon you a levy, by leaving with First Western Bank, San Francisco of levy, on all property, rights to property, moneys, credits and bank deposits then in your possession, to the credit of, belonging to, or owned by Richard D. Leuschner, Sr., c/o Phillip Hershey of 450 Montgomery St., Rm 1521, San Francisco, Calif. who was at the time, and still is, indebted to the United States of America for unpaid internal revenue taxes, together with statutory additions which had accrued thereon at the time of levy, and which amounted at that time to the sum of \$ 207,665.42. Demand was made upon you for the amount set forth in the notice of levy, or for such lesser sum as you may have been indebted to the taxpayer, which demand has not been met.

Your attention is invited to the provisions of Section 6332, Internal Revenue Code, which require that you surrender to the Secretary of the Treasury, or his delegate, the property or rights to property subject to levy.

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Penalty For Violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) Person Defined.—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

Demand is again made for the amount set forth in the notice of levy, \$ 207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served. If you comply with this final demand within five days from its service, no action will be taken to enforce the provisions of section 6332 of the Internal Revenue Code. If, however, this demand is not complied with within five days from the date of its service, it will be deemed to be finally refused by you and proceedings may be instituted by the United States as authorized by the statute quoted above.

DISTRICT DIRECTOR OF INTERNAL REVENUE	BY (Signature)	TITLE
<i>Harold Hawkins</i>	<i>Raymond J. Inochesi</i>	Collection Officer in Charge, Merced, Calif.
Harold Hawkins	Raymond J. Inochesi	Designated Representative.

CERTIFICATE OF SERVICE

I hereby certify that this Final Demand was served by handing a copy thereof to:

First Western Bank and Trust Company

NAME	TITLE
BY: <i>Wm. J. Grogan</i>	
PLACE	DATE
<i>San Francisco, Calif.</i>	<i>4-5-56</i>
COLLECTION OFFICER (Signature)	TIME
<i>Raymond J. Inochesi</i>	<i>11:15 am</i>
	DATE
	<i>4-5-56</i>

108 9 055

U. S. GOVERNMENT PRINTING OFFICE: 1954 O - 324920

remittance to: Raymond J. Inochesi, Collection Officer in Charge.
 Designated Representative,
 420 W 18th Street,
 Merced, California.

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE

In re: Richard D. Lemschner, sr. c/o Phillip
(Name of taxpayer)

San Francisco, California

A Hershey 405 Montgomery St. Rm 1521 S.F.
California (Address)

TO THE COMMISSIONER OF INTERNAL REVENUE:

ATTENTION:

F.J. Stuart, Chief, Special Procedures Section
(Refer to symbols and date of letter requesting this certification)

The following is a transcript of the records of this office covering the accounts of the taxpayer named

above in respect to Income Tax

(Character of tax)

for the as indicated below

(Period covered)

1. TAX- ABLE PERIOD	2. LAST AND FIRST	3. ACCT. NO. OR PAGE AND LINE	4. AMOUNT ASSESSED	PAID, ABATED, OR CREDITED		7. PAID AS. CR.	8. ADJUSTMENT OF OVERASSESSMENTS
				5. DATE OR SCHEDULE NO.	6. AMOUNT		
1943	52 Jan-4-Sp-3-04P		43,265 56				OUTSTANDING
		Int	19,714 28				\$62,979.84
23C Assessment list signed 1-4-52							
23C Assessment list received 1-7-52							
First Notice and Demand 1-15-52							
Second Notice and Demand 4-17-52							
Warrant for Distraint 6-6-52							
Liens 6-6-52 and 7-21-52, 7-18-55							
1040 Orig 966715 272 D Int to 10-19-51							
1944	52 Jan-4 Sp-3-06P		47,485 34				
		Int	18,787 93				\$66,273.27
remarks same as above							
orig 6-300695							
1945	52 Jan-4-Sp-3-08P		23,309 52				
		Int	7,824 02				\$31,133.54
remarks same as above.							
orig 9042200							
1947	52 Feb-8-519030		8,872 80				
		Int	4,910 94	IT-175909	2,477 21	cr	\$11,306.53
1040 9162001, 272 D 292C							
Int to 10-19-51							
First Notice and Demand 2-29-54							
Second Notice and Demand 6-3-52							
Warrant for Distraint 8-7-52							
lien 8-7-52							

I CERTIFY that the foregoing transcript of the accounts of the taxpayer named above in respect to the taxes specified, is true and complete for the period stated, and that all assessments and payments of tax, penalty and interest, and all abatements, credits, and refunds relating thereto as disclosed by the records of this office, are shown therein.

Date of certificate May 24, 19 56

U. S. GOVERNMENT PRINTING OFFICE 10-13009-2

(See instructions on reverse of duplicate)

Harold Hawkins
District Director of Internal Revenue.

[Title of District Court and Cause No. 35398.]

AFFIDAVIT OF RICHARD D. LEUSCHNER

State of California,

City and County of San Francisco—ss.

Richard D. Leuschner, being first duly sworn, deposes and says:

I am a beneficiary of a trust established by Ida Denicke Leuschner on April 16, 1941, which provides for the distribution to me of principal and income in monthly installments. The total annual distributions pursuant to the trust in 1955 were \$7,942.99. My living expenses during that year, on a monthly basis, were as follows:

Food	\$175.00
Milk	10.00
Laundry	32.00
Dental	25.00
Drugs	30.00
Water	18.45
Gas and electricity.....	37.00
Telephone	40.00
Rent	170.00
Firewood	10.00
Clothes	50.00
Insurance	65.00
Travel	70.00
Accounting	20.00

Total\$752.45

For 1956, these expenses will be increased by approximately \$200 per month for medical expenses for my wife. She is suffering from a progressive arthritis which will necessitate constant treatment and medication. A diagnosis of her condition by E. A. Jackson, M. D. is attached hereto and made a part hereof and marked "Exhibit A." It is to be anticipated, in view of my wife's condition, that these expenses will continue and will increase in the near future. In addition, my said wife has had one operation for removal of a malignant cancer and a recurrence can be anticipated.

Because the trust above referred to provides for payments of principal as well as income, the total amount which I receive will diminish each year, and the anticipated total for 1956 is between \$6,000 and \$6,500.

I have no source of income other than the trust above referred to. My age is 53 and I have not been able to obtain a job, though I have made several attempts to obtain employment recently. My wife is without assets or income sufficient for our support.

RICHARD D. LEUSCHNER.

Subscribed and sworn to before me this 17th day of May, 1956.

[Seal] GEORGIA M. JAY,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBIT A

[Letterhead of Edward A. Jackson, M.D., F.A.C.S.,
2630 M Street, Merced, California.]

May 15, 1956

Attorney George DeLew
712 Crocker Bldg.
Post & Montgomery Sts.
San Francisco, California

Re: Elizabeth Leuschner

Dear Mr. DeLew:

The above named lady has been a patient of mine for many years. In 1944 while I was in the service a tumor of the breast was removed, but no malignancy was found, so no further treatment was done. In August 1953 a carcinoma of the uterus was found and a total hysterectomy was done, following which deep x-ray therapy was given. So far, there has been no evidence of any recurrence of this carcinoma, but yet, it is too early to be certain.

In January 1956 she reported to me with severe arthritis involving the wrists, fingers, knees, ankles and feet. All the joints were markedly swollen and reddened and extremely painful. She has not shown any cardiac involvement as yet. She is being treated at the present time with large dosages of cortisone and acthar intermuscularly two or three times a week. This treatment will probably be necessary for a long period of time, and she may even become so crippled with this arthritis that it will require hospital treatment.

As you know cortisone and acthar are extremely

expensive when taken over a long period of time. The amount of cortisone that she takes will cost her at least \$50.00 a month besides the cost of the acthar given in the office.

Yours truly,

/s/ EDWARD A. JACKSON

Edward A. Jackson, M. D.

EAJ:MC

State of California,
County of Merced—ss.

On this 17th day of May 1956, before me, the undersigned, a Notary Public in and for said Merced County, personally appeared Edward A. Jackson, M. D. known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.

Witness my hand and official seal.

PATRICIA A. MELLO,

Notary Public in and for said Merced County and State. My commission expires May 13, 1957.

[Endorsed]: Filed March 8, 1957.

[Title of District Court and Cause No. 35398.]

EXCERPT FROM DOCKET ENTRIES

1956

Apr. 13—Filed complaint and issued summons.

* * * * *

May 3—Filed motion of deft. to bring Richard D. Leuschner and Erida Leuschner Reichert in as 3rd party defts.

1956

May 3—Filed order granting motion to bring in
3rd party defts. (Hamlin)

3—Filed 3rd party complaint & issued sum-
mons.

* * * * *

4—Filed Answer of Deft.

* * * * *

8—Filed answer of Erida Leuschner Reichert
to 3rd party complaint.

8—Filed answer of Erida Leuschner Reichert
to complaint.

8—Filed motion by Richard D. Leuschner to
intervene as deft. May 21, 1956 with
memo., form of order and copy of answer
attached.

* * * * *

21—Filed order granting Richard D. Leusch-
ner leave to intervene. (Murphy)

* * * * *

23—Filed answer of Richard D. Leuschner,
intervener.

May 31—Filed answer of Richard D. Leuschner,
3rd party deft.

* * * * *

Dec. 6—Filed deposition of William O. Hogan.

* * * * *

1957

Feb. 27—Ordered after hearing case consolidated
with 35416 and assigned for trial March
1, 1957 and 3rd party defendant, Leusch-
ner, granted leave to amend answer.
(Harris)

1957

Feb. 27—Filed order granting 3rd party deft. leave to amend answer. (Harris)

27—Filed amendment to answer of 3rd party deft. Richard D. Leuschner.

27—Filed order granting motion of First Western Bank for joint pre-trial hearing and joint trial. (Harris)

Mar. 1—Ord. case cont'd. March 7, 1957 for trial. (Harris)

7—Ord. case assigned to Judge Ritter for trial this date. (Goodman)

Mar. 7—Court trial. Evidence and exhibits introduced, motion of USA to foreclose lien denied and further trial cont'd. to March 8, 1957 at 10 AM. (Ritter)

* * * * *

8—Filed stipulation of facts.

8—Further court trial. Ruled that Richard D. Leuschner has failed in action against First Western Bank and in x-complaint vs. Trustees. Bank not liable to USA under penalty provision and bank allowed atty. fees at prayed. USA no right to foreclose lien. Counsel to prepare findings, conclusions & judgment. (Ritter)

13—Lodged findings of fact and conclusions of law.

13—Lodged judgment.

* * * * *

28—Filed findings & conclusions. (Ritter)

1957

Mar. 28—Entered judgment—filed March 28, 1957
—for plaintiff Richard D. Leuschner in
35416 take nothing and said action is
dism.; United States, plaintiff in 35398
take nothing and action dismiss. First West-
ern Bank & Trust Co. deft. x-complainant
in 35416 and deft-3rd party plttf. in 35398
have judgment of \$3500 atty. fees from
funds on deposit in savings acct. No.
803406 at SF main office of 1st Western
Bank and Trust Co., and Erida Leusch-
ner Reichert, deft. x-deft. & 3rd party
plttf. in 35416 and 3rd party deft. in
35398 recover \$500.00 atty. fees from
funds in account 803406 at SF main office
of 1st Western Bank & Trust Co. (Ritter)

28—Mailed notices.

Apr. 26—Filed notice of appeal by Richard D.
Leuschner.

29—Mailed notices.

26—Filed substitution of C. Ray Robinson as
counsel for Richard D. Leuschner.

29—Filed appeal bond in sum \$250.00.

May 27—Filed notice of appeal by USA.

28—Mailed notices.

28—Filed appellant Leuschner's designation
of record on appeal.

28—Filed statement of points upon which
Leuschner intends to rely on appeal.

28—Filed notice of association of Lewis,
Field, DeGoff and Stein and M. S. Huber-
man as counsel for Leuschner.

1957

May 31—Filed ord. ext. time to docket record on appeal to July 8, 1957. (Murphy)

June 7—Filed reporters transcript of proceedings of trial.

In the United States District Court, Northern
District of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCH-
NER REICHERT and UNITED STATES
OF AMERICA, Cross-Defendants.

PETITION FOR REMOVAL

The cross-defendant, United States of America,
by the undersigned, its attorneys, states that:

1. This petition is brought pursuant to Section
1444 of Title 28, U.S.C., which provides:

Any action brought under Section 2410 of this title against the United States in any State court may be removed by the United States to the District Court of the United States for the district and division in which the action is pending.

2. In an action pending in the Superior Court of the State of California, in and for the City and County of San Francisco, bearing the above caption and No. 456519, a cross complaint by the First Western Bank and Trust Company was filed naming the United States as a cross-defendant.

3. The United States is named a cross-defendant and was served with a copy of the cross-complaint pursuant to the provisions of Section 2410 of Title 28, U.S.C.

4. A copy of the summons and cross-complaint was received by the United States Attorney on April 9, 1956 and copies thereof are attached hereto.

Wherefore, the cross-defendant, the United States of America, prays that this action be removed to this court.

LLOYD H. BURKE,
United States Attorney,

/s/ By LYNN J. GILLARD,
Assistant United States Attorney.

Duly Verified.

Affidavit of Service by Mail Attached.

DEFENDANTS' EXHIBIT "B"

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 456519

Richard D. Leuschner, Plaintiff, vs. First Western
Bank and Trust Company, a California bank-
ing corporation, and Erida Leuschner Reichert,
Defendants.

First Western Bank and Trust Company, a Cali-
fornia banking corporation, Cross-Complainant,
vs. Richard D. Leuschner, Erida Leuschner
Reichert and United States of America, Cross-
Defendants.

SUMMONS

The People of the State of California Send Greet-
ing to: Richard D. Leuschner, Erida Leuschner
Reichert and United States of America, Cross-
Defendants.

You Are Hereby Directed to appear and answer
the cross-complaint in the action entitled as above
brought against you in the Superior Court of the
State of California, in and for the City and County
of San Francisco, within ten days after the service
on you of this summons—if served within this City
and County; or within thirty days if served else-
where; provided, however, that cross-defendant
United States of America, as set forth in Section
2410 of Title 28 of the United States Code, may

Defendants' Exhibit "B"—(Continued)

appear and answer, plead or demur to said cross-complaint within sixty days after such service.

And you are hereby notified that unless you appear and answer as above required, the said cross-complainant will take judgment for any money or damages demanded in the cross-complaint as arising upon contract or will apply to the Court for any other relief demanded in the cross-complaint.

Given under my hand and seal of the Superior Court of the City and County of San Francisco, State of California.

Dated: Apr. 9, 1956.

[Seal] MARTIN MONGAN, Clerk,
By R. F. LIPPI,
Deputy Clerk.

[Title of Superior Court and Cause No. 456519.]

CROSS-COMPLAINT

First Western Bank and Trust Company, as cross-complainant herein, by leave of court first had and obtained, complains of the above named cross-defendants and for a cause of action alleges:

I.

Cross-complainant is and at all times herein mentioned was a banking corporation duly organized and existing under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California. For many years prior to the 9th day of No-

Defendants' Exhibit "B"—(Continued)

vember, 1954, the name of cross-complainant was The San Francisco Bank, but by proceedings duly had, its name was on said 9th day of November, 1954, charged to First Western Bank and Trust Company and its name ever since has been and is now First Western Bank and Trust Company.

II.

Cross-complainant, cross-defendant Richard D. Leuschner and cross-defendant Erida Leuschner Reichert are trustees of a trust created by one Ida Denicke Leuschner in an Agreement of Trust dated the 16th day of April, 1941. Cross-defendant Richard D. Leuschner and cross-defendant Erida Leuschner Reichert are also beneficiaries of said trust, and as such are entitled to receive certain monthly payments of income and principal therefrom.

III.

Cross-complainant as one of said trustees held in its possession as of the time of the filing of the complaint herein a fund in the amount of \$6,991.65 and now holds in its possession a fund in the amount of \$7,462.89, which fund is claimed by cross-defendant Richard D. Leuschner as beneficiary of said trust and is also claimed by cross-defendant United States of America under and pursuant to a notice of levy served on cross-complainant on the 22nd day of July, 1955, for taxes alleged to be due to said United States of America from cross-defendant Richard D. Leusch-

Defendants' Exhibit "B"—(Continued)

ner in the amount of \$207,665.42 with interest at the rate of 6% per annum from July 15, 1955, which claims have been made against cross-complainant without collusion with cross-complainant. Said respective claims of said cross-defendants are adverse to each other and cross-complainant cannot safely determine for itself which claim is right and lawful. Cross-complainant has no interest in said fund or any part thereof except to be discharged from liability therefor and is ready, able and willing to deliver said fund to the person or persons entitled thereto or to deposit the same with this court, and to do any and all things with reference thereto as this court may order.

IV.

Cross-defendant Erida Leuschner Reichert may claim some right, title or interest in said fund or some part thereof as trustee or otherwise, but the nature and extent of any such claim by said cross-defendant is unknown to cross-complainant.

V.

Cross-complainant is informed and believes and upon such information and belief alleges that there is reasonable doubt in law and in fact as to which of said adverse claimants is entitled to receive said fund or some portion thereof, and cross-complainant has no speedy or adequate remedy at law in the premises.

Wherefore, cross-complainant prays that cross-

Defendants' Exhibit "B"—(Continued)
defendants and each of them litigate their respective claims to said fund among themselves, and prays that this court:

1. Determine the costs of suit, including reasonable attorneys' fees to be allowed cross-complainant from said fund;

2. Direct cross-complainant to deposit the balance of said fund with this court;

3. Discharge cross-complainant from any and all liability in connection with said fund to cross-defendants or any of them; and

4. Grant cross-complainant such other and further relief as may be proper.

Dated: April 6, 1956.

ORRICK, DAHLQUIST,
HERRINGTON & SUTCLIFFE,
Attorneys for Defendant and Cross-Complainant,
First Western Bank and Trust Company.

Duly Verified.

[Endorsed]: Exhibit B Filed April 9, 1956. Martin Mangan, Clerk, by R. F. Lippi, Deputy.

[Endorsed]: Filed April 24, 1956. C. W. Calbreath, Clerk.

[Title of District Court and Cause No. 35416.]

MOTION TO BRING IN THIRD-PARTY
DEFENDANT

Erida Leuschner Reichert, one of the defendants above named, moves for leave to make United States of America a party to this action as the same applies to the said defendant, and that there be served upon said United States of America summons and third-party complaint as set forth in Exhibit A hereto attached.

SLACK & ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Defendant, Erida
Leuschner Reichert.

Notice of Motion

To M. Mitchell Bourquin, Esq., and George De
Lew, Esq., Attorneys for Plaintiff Richard D.
Leuschner:

Please take notice that the undersigned will bring the above motion on for hearing before this Court, Room 256 Post Office Building, 7th and Mission Streets, San Francisco, California, on the 7th day of May, 1956, at 9:30 A.M. of the said day, or as soon thereafter as counsel can be heard.

SLACK AND ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for Defendant, Erida
Leuschner Reichert.

[Note: Exhibit A—Third Party Complaint is set out at pages 58-61.]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 30, 1956.

[Title of District Court and Cause No. 35416.]

ORDER GRANTING MOTION TO BRING
IN THIRD PARTY DEFENDANT

Upon reading the motion of Erida Leuschner Reichert to bring in the United States of America as a third party defendant and it appearing to the court that the said United States of America is a necessary party, if complete relief is to be accorded herein and should be joined herein as a third party defendant.

It Is Hereby Ordered, Adjudged and Decreed that the said motion be and the same is hereby granted that said United States of America be and it is hereby made a party to this action and that there be served upon it summons and third party complaint as set forth in Exhibit A attached to said motion.

Dated: May 9th, 1956.

/s/ O. D. HAMLIN,

Judge of the U. S. District Court.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF CROSS-DEFENDANT RICH-
ARD D. LEUSCHNER TO CROSS-COM-
PLAINT

Comes now Richard D. Leuschner, plaintiff and one of the cross-defendants in the above entitled action, and, answering the cross-complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraph III of said cross-complaint, this answering defendant denies that cross-complainant First Western Bank and Trust Company, a California banking corporation, cannot determine for itself the adverse claims to the funds in possession of cross-complainant, as trustee, as alleged in said cross-complaint, and alleges that cross-defendant Richard D. Leuschner is solely entitled to the sums mentioned in said paragraph. Denies that cross-complainant has no interest in said sums of money, and alleges that cross-complainant has an interest therein as trustee and, by the terms of the trust agreement referred to in paragraph II of said cross-complaint, is obligated to pay said sums to Richard D. Leuschner and to no one else, and that its failure to pay said sums, as in said trust agreement provided, is a breach of its fiduciary relationship with this answering cross-defendant.

II.

Answering the allegations contained in paragraph IV of the cross-complaint on file herein, this an-

swering cross-defendant admits that Erida Leuschner Reichert has an interest, as trustee, in the sums of money referred to in paragraph III of the cross-complaint hereinabove referred to, and alleges that said Erida Leuschner Reichert has an interest therein as trustee and that, by the terms of the trust agreement referred to in paragraph II of said cross-complaint, her obligation as trustee is to pay said sums to Richard D. Leuschner and to no one else, and that her failure to pay said sums as in said trust agreement provided is a breach of her fiduciary relationship with this answering cross-defendant. Except as herein expressly admitted, this answering cross-defendant denies each and every, all and singular, the remaining allegations contained in paragraph IV of said cross-complaint.

III.

Answering the allegations contained in paragraph V of the said cross-complaint, this answering cross-defendant denies each and every, all and singular, the allegations contained therein. Alleges that this answering cross-defendant is entitled to all of the funds now held by cross-complainant in its capacity as trustee under the terms of the trust referred to in paragraph II of the cross-complaint.

As a further, separate and distinct defense to said cross-complaint, cross-defendant Richard D. Leuschner alleges:

I.

That cross-complainant is now, and at all times mentioned herein has been, trustee of a trust created by Ida Denicke Leuschner, which trust pro-

vides for the receipt of rents and profits within the meaning of § 859 of the Civil Code of the State of California; that cross-complainant has in its possession, as one of said trustees, the sum of \$7,462.89 which, by the terms of the trust, is now due and owing to cross-defendant Richard D. Leuschner.

II.

That this entire sum is necessary for the support of cross-defendant Richard D. Leuschner within the meaning of § 859 of the Civil Code of the State of California. That all sums subsequently accruing under said trust are now and will be necessary for the support of cross-defendant Richard D. Leuschner; that neither the United States, nor any other person, has any interest in said sums now due or to become due cross-defendant Richard D. Leuschner, and that cross-complainant holds the sum of \$7,462.89 without any right whatsoever.

Wherefore, cross-defendant Richard D. Leuschner prays that cross-complainant take nothing by its cross-complaint and that this cross-defendant have judgment against cross-complainant and the cross-defendants other than this cross-defendant for the sum of \$7,462.89 and his costs of court, and for such other relief as to the court may seem meet.

/s/ M. MITCHELL BOURQUIN,

/s/ GEORGE DeLEW,

Attorneys for Plaintiff and Cross-defendant Richard D. Leuschner.

Duly Verified.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed May 1, 1956.

In the District Court of the United States, Northern District of California, Southern Division

Civil Action No. 35416

Richard D. Leuschner, Plaintiff, vs. First Western Bank and Trust Company, a California banking corporation, and Erida Leuschner Reichert, Defendants.

First Western Bank and Trust Company, a California banking corporation, Cross-complainant, vs. Richard D. Leuschner, Erida Leuschner Reichert, and United States of America, Cross-defendants.

Erida Leuschner Reichert, Defendant and third-party Plaintiff, vs. United States of America, Third-party Defendant.

THIRD PARTY COMPLAINT

Erida Leuschner Reichert, as third-party plaintiff herein, by leave of Court first had and obtained, complains of the above named United States of America, and for a cause of action alleges:

I.

The above named Richard D. Leuschner, as plaintiff in the original action commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, filed against the third party plaintiff and the above named First Western Bank and Trust Company, his complaint

against them as co-trustees with the said Richard D. Leuschner of that certain trust created by one Ida Denicke Leuschner in an Agreement of Trust dated April 16, 1941. The said Richard D. Leuschner and third-party plaintiff are also beneficiaries of the said trust, and as such are entitled to receive certain monthly payments of income and principal therefrom.

II.

Third-party plaintiff, as one of the said trustees, had in her possession at the time of the filing of the said complaint, a fund in the amount of \$6,991.65, and now holds, as such trustee, a fund in the approximate amount of \$7,462.89, which said fund is claimed by the said Richard D. Leuschner as beneficiary of the said trust, and is also claimed by third-party defendant United States of America under and pursuant to a notice of levy served on the said First Western Bank and Trust Company on July 22, 1955, for certain taxes alleged to be due to said United States of America from said Richard D. Leuschner in the amount of \$207,665.42 with interest at the rate of 6% per annum from July 15, 1955, which claims have been made against third-party plaintiff without collusion with third-party plaintiff. The said respective claims of the said Richard D. Leuschner and the said United States of America are adverse to each other and third-party plaintiff cannot safely determine for herself which claim is right and lawful. Third-party plaintiff, as an individual, has no interest in the said fund or any part thereof, except to be discharged

from liability therefor, and, as such trustee, is ready, able and willing to deliver the said fund to the person, persons or institutions which are properly entitled thereto, or to deposit the same with this Court, and to do any and all things with reference thereto as this Court may order.

III.

The said United States of America has already been joined as a cross-defendant by third-party plaintiff's co-trustee, First Western Bank and Trust Company, as to the interest of that trustee in the said fund, and all parties have been served with copies of the various complaints and documents herein referred to.

Wherefore, third-party plaintiff prays that the said Richard D. Leuschner, already a party hereto, and said third-party defendant, and each of them, be required to litigate their respective claims to the said fund between themselves, and pray that this Court:

1. Determine the costs of suit, including costs of suit incurred in the State Court prior to removal to the cause therefrom and reasonable attorneys' fees to be allowed third-party plaintiff from the said fund;
2. Direct third-party plaintiff, as such trustee, to deposit the balance of the said funds with this Court;
3. Discharge third-party plaintiff from any and

all liability in connection with the said fund to the said third-party defendant and the said Richard D. Leuschner, or either of them; and

4. Grant third-party plaintiff such other and further relief as may be proper.

SLACK & ZOOK,
JOHN E. TROXEL,

/s/ By JOHN E. TROXEL,
Attorneys for third-party Plaintiff Erida Leusch-
ner Reichert.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF THE UNITED STATES OF
AMERICA TO THIRD PARTY COM-
PLAINT

The United State of America by the undersigned, its attorneys, for its answer to the third party complaint of Erida Leuschner Reichert:

I.

Admits the allegations contained in paragraph I, except that the rights of Richard D. Leuschner to receive any money from the trust are subject to the rights of the United States hereinafter referred to.

II.

Denies any knowledge or information sufficient

to form a belief as to each and every allegation in paragraph II, except admits that the United States of America served a notice of levy upon the First Western Bank and Trust Company as alleged, and has a claim pursuant to such levy as well as the tax liens set forth below, and specifically denies the allegation that the plaintiff could not safely determine whether compliance with the levy should be made.

III.

Admits the allegations contained in paragraph III, except denies jurisdiction over the United States of America.

First Separate and Affirmative Defense.

The complaint fails to state a claim against the defendant United States upon which relief can be granted.

Second Separate and Affirmative Defense.

The United States has not consented to be sued in this form of action and, therefore, this court lacks jurisdiction over the United States as a defendant.

Third Separate and Affirmative Defense.

All right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof is subject to the tax liens of the United States based upon assessments duly made for income taxes for the years 1943, 1944, 1945, and 1947, as follows:

1943, assessment list received January 7, 1952, in the amount of \$62,979.84, plus interest as provided by law.

1944, assessment list received January 7, 1952, in the amount of \$66,273.27, plus interest as provided by law.

1945, assessment list received January 7, 1952, in the amount of \$31,133.54, plus interest as provided by law.

1947, assessment list received February 11, 1952, in the amount of \$11,306.53, plus interest as provided by law.

These amounts although duly demanded are unpaid.

Notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, covering the last year referred to above, and in Merced County, California, on July 21, 1952, covering the first three years referred to above and on September 24, 1952, covering the last year mentioned above.

Wherefore, defendant prays

1. That the complaint herein be dismissed.

2. In the alternative, in the event it is determined that the court has jurisdiction that all monies or other property due Richard D. Leuschner from the trust herein, or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3. That the interest of Richard D. Leuschner in the trust herein, to the extent of the tax liens, be declared to be payable to the United States of America, and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner, to the United States of America until the amounts outstanding on its liens are fully paid.

4. For such other and further relief as may be proper.

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

/s/ LEON YUDKIN,

Special Assistant to the Regional Counsel, Internal Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 22, 1956.

[Title of District Court and Cause No. 35416.]

ANSWER OF THE UNITED STATES OF AMERICA TO CROSS-COMPLAINT

The United States of America by the undersigned, its attorneys, for its answer to the cross-complaint of the First Western Bank and Trust Company,

I.

Admits the allegations contained in paragraph I.

II.

Admits the allegations contained in paragraph II of the complaint, except that the rights of Richard D. Leuschner to receive certain monthly payments of income and principal, are subject to the rights of the United States as more fully set forth herein.

III.

Admits the allegations contained in paragraph III of the complaint, except denies any knowledge or information sufficient to form a belief as to the amounts of money held by the cross-complainant and in what capacity and denies that "cross-complainant cannot safely determine for itself which claim is right and lawful." In further answer to paragraph III, the United States alleges that the basis of its claim is not limited to the levy referred to therein.

IV.

Denies any knowledge or information sufficient to form a belief as to the allegations in paragraph IV.

V.

Denies the allegations contained in paragraph V.

First Separate and Affirmative Defense.

The complaint fails to state a claim against the defendant United States upon which relief can be granted.

Second Separate and Affirmative Defense.

The United States has not consented to be sued in this form of action and, therefore, this court

lacks jurisdiction over the United States as a defendant.

Third Separate and Affirmative Defense.

All right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof is subject to the tax liens of the United States based upon assessments duly made for income taxes for the years 1943, 1944, 1945, and 1947, as follows:

1943, assessment list received January 7, 1952, in the amount of \$62,979.84, plus interest as provided by law.

1944, assessment list received January 7, 1952, in the amount of \$66,273.27, plus interest as provided by law.

1945, assessment list received January 7, 1952, in the amount of \$31,133.54, plus interest as provided by law.

1947, assessment list received February 11, 1952, in the amount of \$11,306.53, plus interest as provided by law.

These amounts although duly demanded are unpaid.

Notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, covering the last year referred to above, and in Merced County, California, on July 21, 1952, covering the first three years referred to above and on September 24, 1952, covering the last year mentioned above.

Wherefore, defendant prays

1. That the complaint herein be dismissed.

2. In the alternative, in the event it is determined that the court has jurisdiction, that all monies or other property due Richard D. Leuschner from the trust herein, or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3. That the interest of Richard D. Leuschner in the trust herein, to the extent of the tax liens, be declared to be payable to the United States of America, and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner, to the United States of America until the amounts outstanding on its liens are fully paid.

4. For such other and further relief as may be proper.

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

/s/ LEON YUDKIN,

Special Assistant to the Regional Counsel, Internal
Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Aug. 22, 1956.

In The United States District Court, Northern
District of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

No. 35398

UNITED STATES OF AMERICA, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Defendant.

ORDER FOR JOINT PRE-TRIAL HEARING
AND JOINT TRIAL

Upon the motion of Christopher M. Jenks and
Orrick, Dahlquist, Herrington & Sutcliffe, attor-
neys for First Western Bank and Trust Company,
defendant and cross-complainant in Action No.
35416, defendant and third party plaintiff in Action
No. 35398, and good cause appearing therefor,

It Is Hereby Ordered that the two above entitled cases be and they are hereby consolidated for the purpose of a pre-trial hearing and joint trial on all matters involved in both of said cases, and

It Is Further Ordered that signed copies of this Order be filed in both of said cases.

Dated: February 27, 1957.

/s/ GEO. B. HARRIS,

United States District Judge.

[Endorsed]: Filed Feb. 27, 1957.

[Title of District Court and Causes No. 35416 and 35398.]

OBJECTIONS BY UNITED STATES OF
AMERICA TO PROPOSED FINDINGS OF
FACT AND REQUEST FOR ADDITIONAL
FINDINGS OF FACT

Comes now, the United States of America by its attorneys, Lloyd H. Burke, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, and Leon Yudkin & Godfrey L. Munter, Jr., Attorneys, Office of Regional Counsel, Internal Revenue Service, and objects to the proposed findings of fact and conclusions of law heretofore filed in this action by the attorneys for the First Western Bank and Trust Company as follows:

I.

Objects to proposed finding "2.a." which provides as follows:

“On July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company, none of the income or corpus of the aforesaid trust was due to Richard D. Leuschner as a beneficiary thereof.”

and requests that in lieu thereof, the Court make the following finding:

On July 22, 1955, when the Notice of Levy was received by the First Western Bank and Trust Company, Richard D. Leuschner, as a beneficiary of the aforesaid trust, had due him a 40% interest in the income of the trust, but such amount was not payable until the last banking day of the month.

The requested finding makes a distinction between the terms “due” and “payable” that is not made clear in the bank’s proposed findings. Under the terms of the trust agreement (paragraph II) it is clear that Richard D. Leuschner had due him as a beneficiary of the trust, 40% of the current income even though such amounts were not payable until the end of the month (see paragraph II of the trust agreement.) This distinction was recognized by the Court when it indicated the basis of its decision. (Transcript (March 8, 1957) page 44, lines 9 and 10.)

II.

Objects to proposed finding “2.b.” which provides as follows:

“The final demand received by First Western Bank and Trust Company on April 5, 1956, did not apply to any money which became due to

Richard D. Leuschner as a beneficiary of said trust after July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company."

and requests that in lieu thereof, the Court make the following finding:

The final demand received by First Western Bank and Trust Company on April 5, 1956, referred to the levy served on the First Western Bank and Trust Company on July 22, 1955, and was effective only to the same extent that the levy was effective.

III.

Objects to proposed finding "2.c." which provides as follows:

"It was not the intent of Congress in enacting Section 6332 of the Internal Revenue Code to impose a penalty on a bank or other stakeholder which has failed to respond to a final demand under the circumstances involved herein."

and requests the Court to make in lieu thereof, the following finding:

The First Western Bank and Trust Company is not subject to liability under Section 6332 of the Internal Revenue Code for failure to respond to the levy served upon them by the Internal Revenue Service.

The requested finding limits itself to the basis of the Court's decision as set forth on page 44 of the transcript. Further, the bank's proposed finding

speaks of a final demand, whereas Section 6332 speaks of a failure to honor a levy.

IV.

Objects to proposed finding "2.e." which provides as follows:

"The Answer filed by the United States of America to the cross-complaint of First Western Bank and Trust Company in civil action No. 35416 does not state a claim for foreclosure of any lien which the United States of America may have on the interest of Richard D. Leuschner as a beneficiary of said trust."

on the ground that said finding is contrary to the evidence. The cross-complaint of the First Western Bank and Trust Company is one in interpleader, requiring the United States to come forth and state its claim to the funds in question. This, the United States did, expressly stating that it was claiming the funds by virtue of its Federal tax liens in addition to its rights to the fund under the aforementioned levy. Admittedly, the word "foreclosure" was not used, but the facts sufficient to justify relief were pleaded and the prayer made it clear what relief was being sought albeit inartistically. Should this objection be sustained, item 4 of paragraph VIII herein should be eliminated.

V.

Objects to proposed finding "2.g." which provides as follows:

"First Western Bank and Trust Company

and Erida Leuschner Reichert, as trustees of said trust, are entitled to reimbursement in the amounts of \$3,500.00 and \$500.00 respectively, as reasonable attorneys' fees incurred in connection with the controversy involved in this litigation and are entitled to such reimbursement from funds on deposit in Savings Account No. 803406 at the San Francisco main office of First Western Bank and Trust Company."

on the ground that this is a conclusion of law. It would seem clear that a finding on the subject matter involved would have to contain findings of what reasonable attorneys' fees were, and that they were in fact incurred and that the parties are entitled to them under the interpleader statute or the trust instrument or whatever the basis for their allowance might have been.

VI.

Since the proposed findings do not settle the disposition of the cross-complaint in interpleader filed by the First Western Bank and Trust Company, nor the third-party complaint filed by Erida Leuschner Reichert, it is requested that the Court make the following additional findings of fact:

a. That in action No. 35416, the Court has jurisdiction of the parties thereto and the subject matter therein.

b. That the cross-complaint in interpleader filed by the First Western Bank and Trust Company in action No. 35416, states a good cause of action in interpleader and was properly filed by the First

Western Bank and Trust Company. The defendants in interpleader, each filed their answers setting forth their respective claims to the interpleader funds.

c. That in action No. 35398, the Court has jurisdiction of the parties thereto and the subject matter therein.

d. That the levy served on the First Western Bank and Trust Company was adequate to take and seize the beneficial interest of Richard D. Leuschner in the trust created by Ida Denicke Leuschner. (Transcript page 30.)

VII.

Objection is made to proposed conclusions of law 3 and 4 on the ground that there are no findings of fact to support such conclusions of law.

VIII.

It is respectfully requested that the Court make the following additional conclusions of law.

1. The cross-complaint in interpleader filed by the First Western Bank and Trust Company in action No. 35416 was a good and sufficient interpleader.

2. The Notice of Levy served by the United States of America on the First Western Bank and Trust Company on July 22, 1955, was a good and sufficient levy and was effective to seize the beneficial interest of Richard D. Leuschner in the trust created by Ida Denicke Leuschner.

3. The third-party complaint filed by Ida Den-

icke Leuschner in action No. 35416 is dismissed with prejudice.

4. The cross-complaint in interpleader filed by the First Western Bank and Trust Company is dismissed with prejudice. (This last item subject to IV above.)

LLOYD H. BURKE,

United States Attorney,

/s/ By CHARLES ELMER COLLETT,

Assistant United States Attorney,

LEON YUDKIN &

GODFREY L. MUNTER, JR.,

Attorneys, Office of Regional Counsel, Internal Revenue Service,

/s/ By LEON YUDKIN,

Attorneys for the United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 18, 1957.

[Title of District Court and Causes Nos. 35416 & 35398.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cases, heretofore consolidated for trial, came on regularly for trial on March 7, 1957, and the court having considered the evidence, including the Stipulation of Facts filed herein,

makes the following findings of fact and conclusions of law:

Findings of Fact

1. The court finds, in accordance with the Stipulation of Facts:

a. On the dates shown below, the Commissioner of Internal Revenue or his duly authorized delegate assessed against Richard D. Leuschner, Federal Income taxes for the period and in the amounts set forth below. On the dates shown below, the assessments lists containing these assessments were received in the office of the District Director of Internal Revenue at San Francisco, California. Shortly after the receipts of each assessment list, notice and demand for the payment of each tax so assessed was duly made against the taxpayer, but despite the notice and demand for payment the taxpayer has paid, if any, only the amount set forth below.

NATURE OF TAX & PERIOD	DATE OF ASSESSMENT	ASSESSMENT LISTS RECEIVED	AMOUNT OF ASSESSMENT	AMOUNT PAID	NOTICE OF TAX LIEN FILED	UNPAID BALANCE
Income 1943	1/4/52	1/ 7/52	\$62,979.84	0	6/ 6/52 7/21/52	\$62,979.84
Income 1944	1/4/52	1/ 7/52	66,273.27	0	6/ 6/52 7/21/52	66,273.27
Income 1945	1/4/52	1/ 7/52	31,133.54	0	6/ 6/52 7/21/52	31,133.54
Income	2/8/52	2/11/52	13,783.74	2,477.21	8/ 7/52	11,306.53

b. On July 22, 1955 a Notice of Levy (a true copy of which is attached to said Stipulation of Facts) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank and Trust Company, San Francisco, California. On April 5, 1956 a Final Demand (a true copy of which is at-

tached to said Stipulation of Facts) was delivered to a Trust Officer or Assistant Trust Officer of the First Western Bank and Trust Company, San Francisco, California.

c. On the date of the delivery of the Notice of Levy described above the First Western Bank and Trust Company was and now is one of three co-trustees of a Trust created by Ida Denicke Leuschner. On the date of the delivery of the Notice of Levy described above Richard D. Leuschner was and now is one of the beneficiaries of the Trust created by Ida Denicke Leuschner. In connection with the administration of the aforesaid trust all receipts of income attributable to this trust were deposited in a commercial account containing deposits of trusts being administered in whole or in part by the First Western Bank and Trust Company. Payments to the beneficiaries of the Leuschner trust were made by checks drawn on this commercial account and signed by an officer of the Trust Department of the First Western Bank and Trust Company.

d. Payments to other beneficiaries of the Leuschner trust have been made and are being made in the manner set forth above but no payments have been made from said trust to Richard D. Leuschner since the delivery of the above mentioned Notice of Levy.

e. The First Western Bank and Trust Company has refused and still refuses to pay any monies to the United States of America under the above

mentioned Trust agreement but has been and is now willing to deposit said funds in court.

2. The court further finds:

a. On July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company, none of the income or corpus of the aforesaid trust was due to Richard D. Leuschner as a beneficiary thereof.

b. The Final Demand received by First Western Bank and Trust Company on April 5, 1956 did not apply to any money which became due to Richard D. Leuschner as a beneficiary of said trust after July 22, 1955, when the Notice of Levy was received by First Western Bank and Trust Company.

c. It was not the intent of Congress in enacting Section 6332 of the Internal Revenue Code to impose a penalty on a bank or other stakeholder which has failed to respond to a final demand under the circumstances involved herein.

d. First Western Bank and Trust Company, Erida Leuchner Reichert and Richard D. Leuschner were on July 22, 1955, at all times since have been and now are the trustees under said Agreement of Trust, and no Notice of Levy or Final Demand in connection with the taxes involved herein was served upon or delivered to Erida Leuschner Reichert or Richard D. Leuschner as such trustees.

e. The right of the United States of America to collect unpaid income taxes from Richard D. Leuschner must prevail over the "spendthrift" pro-

visions of the Agreement of Trust, a copy of which is attached to the complaint in Civil Action No. 35416 and therefore it is unnecessary to determine whether the sum of \$750 per month which Richard D. Leuschner testified was necessary for his support, or any other sum, is necessary therefor within the meaning of Section 859 of the Civil Code of the State of California.

f. The answer filed by the United States of America to the cross-complaint of First Western Bank and Trust Company in Civil Action No. 35416 does not state a claim for foreclosure of any lien which the United States of America may have on the interest of Richard D. Leuschner as a beneficiary of said trust.

g. First Western Bank and Trust Company and Erida Leuschner Reichert as trustees of said trust are entitled to reimbursement in the amounts of \$3,500 and \$500, respectively, as reasonable attorneys' fees incurred in connection with the controversy involved in this litigation and are entitled to such reimbursement from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Conclusions of Law

1. Civil Action No. 35416 filed by Richard D. Leuschner as plaintiff must be dismissed.

2. Civil Action No. 35398 filed by the United States of America as plaintiff must be dismissed.

3. First Western Bank and Trust Company as trustee under the aforesaid Agreement of Trust is entitled to judgment in the sum of \$3,500 as attorneys' fees incurred in connection with the controversy involved in this litigation, said sum to be paid from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

4. Erida Leuschner Reichert as trustee under the aforesaid Agreement of Trust is entitled to judgment in the sum of \$500 as attorneys' fees incurred in connection with the controversy involved in this litigation, said sum to be paid from funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Dated: March 28, 1957.

/s/ WILLIS W. RITTER,
United States District Judge.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

In the United States District Court, Northern
Division of California, Southern Division

No. 35416

RICHARD D. LEUSCHNER, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation, and
ERIDA LEUSCHNER REICHERT,
Defendants.

No. 35398

UNITED STATES OF AMERICA, Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California banking corporation,
Defendant.

JUDGMENT

The above entitled cases, heretofore, consolidated for trial, came on regularly for trial on March 7, 1957 before the Court (a jury having been waived), all parties being represented by counsel, and the Court having made findings of fact and conclusions of law,

It Is Hereby ordered, adjudged and decreed that Richard D. Leuschner, plaintiff in Civil Action No.

35416, take nothing in said action and the same is hereby dismissed on the merits; and

It Is Further Ordered, Adjudged and Decreed that the United States of America, plaintiff in Civil Action No. 35398, take nothing in said action and the same is hereby dismissed on the merits; and

It Is Further Ordered, Adjudged and Decreed that First Western Bank and Trust Company, defendant and cross-complainant in Civil Action No. 35416, defendant and third party plaintiff in Civil Action No. 35398, have and recover the sum of \$3,500 as attorneys' fees from the funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company; and

It Is Further Ordered, Adjudged and Decreed that Erida Leuschner Reichert, defendant, cross-defendant and third party plaintiff in Civil Action No. 35416, and third party defendant in Civil Action No. 35398, have and recover the sum of \$500 as attorneys' fees from the funds on deposit in Savings Account No. 803406 at the San Francisco Main Office of First Western Bank and Trust Company.

Dated: March 28, 1957.

/s/ WILLIS W. RITTER,

United States District Judge.

Entered in Civil Docket 3/28/57.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Causes Nos. 35398 & 35416.]

NOTICE OF APPEAL

To the United States Court of Appeals for the Ninth Circuit:

Notice Is Hereby Given that Richard D. Leuschner, plaintiff, cross-defendant and third party defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the judgment made and entered on March 28, 1957, in the above entitled matter as follows:

“It Is Hereby Ordered, Adjudged and Decreed that Richard D. Leuschner, plaintiff in Civil Action No. 35416, take nothing in said action and the same is hereby dismissed on the merits”;

Dated this 25th day of April, 1957.

/s/ C. A. CANELLO,

/s/ C. RAY ROBINSON,

Attorneys for Richard D. Leuschner.

[Endorsed]: Filed April 26, 1957.

[Title of District Court and Cause No. 35416.]

EXCERPT FROM DOCKET ENTRIES

1956

Apr. 24—Filed petition for removal with X-complaint and summons.

30—Filed notice & motion of Erida Leuschner Reichert to bring in 3rd party deft. May 7, 1957.

* * * * *

May 8—Filed 3rd party complaint and issued summons.

9—Filed order granting motion to bring in 3rd party deft. (Hamlin)

* * * * *

Aug. 22—Filed answer of United States to 3rd party complaint.

22—Filed answer of United States to x-complaint.

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Mar. 1—Ordered, case cont'd. to March 7, 1957 for trial. (Harris)

7—Ord. case assigned to Judge Ritter for trial this date. (Goodman)

7—Court trial. Evidence and exhibits introduced, motion of USA to enforce lien denied and further trial cont'd. to March 7, 1957 at 10 AM. (Ritter)

8—Further court trial. Ruled that Richard D. Leuschner has failed in action against First Western Bank and in x-complaint vs. Trustees. Bank not liable to USA un-

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Mar. 8 der penalty provision and bank allowed
(Cont.) atty. fees as prayed. USA no right to
foreclose lien. Counsel to prepare find-
ings, conclusions & judgment. (Ritter)

Mar. 13—Lodged findings of fact and conclusions
of law.

13—Lodged judgment.

* * * * *

28—Filed findings & conclusions (In 35398).
(Ritter)

28—Entered judgment — filed March 28, 1957
—that plaintiff Richard D. Leuschner in
35416 take nothing and said action is
dism., United States, Plaintiff in 35398
take nothing and action dismiss. First West-
ern Bank & Trust Co. deft. x-complainant
in 35416 and deft.-3rd party plttf. in
35398 have judgment of \$3500 atty. fees
from funds on deposit in Savings Acct.
No. 803406 at SF main office of 1st West-
ern Bank and Trust Co. and Erida
Leuschner Reichert deft.x-deft. & 3rd
party plttf. in 35416 and 3rd party deft.
in 35398 recover \$500.00 atty. fee from
funds on account 803406 at SF main of-
fice of 1st Western Bank & Trust Co. (In
35398). (Ritter)

Mar. 28—Mailed notices.

Apr. 26—Filed notice of appeal by Richard D.
Leuschner (In 35398-Civ.).

29—Mailed notices.

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- Apr. 26—Filed substitution of C. Ray Robinson as counsel for Richard D. Leuschner (In 35398).
- 29—Filed appeal bond in sum of \$250.00 (In 35398).
- May 27—Filed notice of appeal by USA (In 35398).
- 28—Mailed notices.
- 28—Filed designation of Leuschner of record on appeal (In 35398).
- 28—Filed statement of points upon which Leuschner intends to rely on appeal (In 35398).
- 28—Filed notice of association of Lewis, Field DeGoff & Stein and M. S. Huberman as counsel for appellant, Leuschner (In 35398).
- 31—Filed ord. ext. time to docket record on appeal to July 8, 1957 (In 35398). (Murphy).
- June 7—Filed reporter's transcript of trial proceedings (In 35398).

[Title of District Court and Causes Nos. 35398-35416.]

DESIGNATION OF MATTERS FOR INCLUSION IN RECORD ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, and in regard to appeals, appellant Richard D. Leuschner hereby designates for inclusion in the record on appeal to the United

States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed April 26, 1957, the following portions of the record and proceedings and evidence in action No. 35398 in the above entitled Court:

1. The complaint;
2. The third party complaint;
3. The answer of the defendant First Western Bank and Trust Company;
4. Answer of third party defendant Erida Leuschner Reichert to third party complaint;
5. Answer of third party defendant Erida Leuschner Reichert to original complaint;
6. Motion of Richard D. Leuschner to intervene as a defendant;
7. Order permitting intervention of Richard D. Leuschner;
8. Answer of Richard D. Leuschner, intervenor;
9. Answer of third party Richard D. Leuschner;
10. Motion of Richard D. Leuschner to amend answer;
11. Order permitting amendment to answer of Richard D. Leuschner;
12. Amendment to answer of third party Richard D. Leuschner;
13. Order for joint pretrial hearing and joint trial;
14. Stipulation of facts;
15. Objections by United States of America to proposed findings of fact and request for additional findings of fact;
16. Notice of appeal;

17. This designation;
18. Journal entries;
19. The deposition of William O. Hogan;
20. The reporter's transcript in its entirety, including all exhibits introduced in evidence and/or marked for identification.

And appellant Richard D. Leuschner hereby further designates the following portions of the record, proceedings and evidence in action No. 35416, in the above entitled Court (in so far as said designation is not duplicated by the designation applicable to the record, proceedings and evidence in action No. 35398):

1. Cross-complaint in action No. 456519, in the Superior Court of the State of California, in and for the City and County of San Francisco;

2. Petition of the United States of America for removal;

3. Motion of Erida Leuschner Reichert to bring in United States of America as third party defendant;

4. Order granting motion to bring in third party defendant;

5. Answer of cross-defendant Richard D. Leuschner to cross complaint;

6. Third party complaint;

7. Answer of United States of America to third party complaint;

8. Answer of United States of America to cross-complaint;

9. Findings of fact and conclusions of law;

10. Judgment.

Dated: May 27th, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,

/s/ By SIDNEY DeGOFF,
Attorneys for Appellant, Richard
D. Leuschner.

[Endorsed]: Filed May 28, 1957.

[Title of District Court and Causes Nos. 35398-
35416.]

CERTIFICATE OF CLERK TO CONSOLI-
DATED RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above entitled cases and constitute the record on appeal herein as designated by the attorneys for the appellant:

In 35398-Civil:

Excerpt from Docket Entries.

Complaint.

Order Granting Motion to Bring in Necessary Parties and Third Party Defendants.

Third Party Complaint.

Answer of First Western Bank and Trust Company.

Answer of Third-Party Deft. Erida Leuschner Reichert to Third Party Complaint.

Answer of Third-Party Deft. Erida Leuschner Reichert to Original Complaint.

Motion of Richard D. Leuschner to intervene as Defendant.

Order Permitting Richard D. Leuschner to intervene.

Answer of Richard D. Leuschner, Intervener.

Answer of Richard D. Leuschner, Third Party Deft.

Motion of Richard D. Leuschner to Amend Answer.

Order Permitting Richard D. Leuschner to Amend Answer.

Amendment to Answer of Richard D. Leuschner, Third Party Deft.

Stipulation of Facts.

Deposition of William O. Hogan.

In 35416-Civil:

Excerpt from Docket Entries.

Petition for Removal by United States with copy of Cross-Complaint.

Motion of Erida Leuschner Reichert to Bring in Third-Party Defendant.

Answer of x-deft. Richard D. Leuschner to Cross-Complaint.

Third Party Complaint.

Order Granting Motion to Bring in Third Party Deft.

Order Denying Motion of United States to Dismiss.

Answer of United States to Third Party Complaint.

Answer of United States of America to Cross-Complaint.

In 35398 and 35416-Consolidated:

Order for Joint Pre-Trial and Trial.

Objections by United States of America to Proposed Findings and Request for Additional Findings of Fact.

Findings of Fact and Conclusions of Law.

Judgment.

Substitution of Attorneys.

Notice of Appeal by Richard D. Leuschner.

Cost Bond on Appeal.

Notice of Appeal by United States of America.

Designation of Record on Appeal by Richard D. Leuschner.

Statement of Points Upon Which Richard D. Leuschner Intends to Rely on Appeal.

Notice of Association of Attorneys.

Order Extending Time to Docket Record on Appeal.

Reporter's Transcript of Trial Proceedings March 7, 8 and 28, 1957.

Defendants' Exhibits A, C and D. (Note: Exhibit B is not included for the reason it does not appear in the files in this office.)

In Witness Whereof I have hereunto set my

hand and affixed the seal of said District Court this 8th day of July, 1957.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause No. 35398.]

DEPOSITION OF WILLIAM O. HOGAN

Be It Remembered, that pursuant to oral stipulation, and on Friday, October 19, 1956, commencing at the hour of 2:00 p.m. thereof, at the offices of the United States Attorney, 445 Post Office Building, Seventh and Mission Streets, San Francisco, California, before me, Helen M. Sayer, a Notary Public in and for the City and County of San Francisco, State of California, personally appeared

WILLIAM O. HOGAN

called as a witness by the plaintiff, who, being by me first [1]* duly sworn, was thereupon examined and interrogated as hereinafter set forth.

Hon. Lloyd H. Burke, United States Attorney, by Leon Yudkin, Esq., Special Assistant to the Regional Counsel, Internal Revenue Service, appeared as Attorney for the United States of America, Plaintiff.

Christopher M. Jenks, Esq., appeared as attorney

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Deposition of William O. Hogan.)

for First Western Bank & Trust Co., Defendant and Third Party Plaintiff.

M. Mitchell Bourquin, Esq., by George DeLew, Esq., appeared as attorney for Richard Leuschner, Third Party Defendant.

Messrs. Slack & Zook, by John S. Troxel, Esq., appeared as attorneys for Erida L. Reichert, Third Party Defendant.

(It was stipulated by counsel for the respective parties that the Notary Public, after swearing the witness, might be excused from further attendance.)

Mr. Yudkin: Does anyone wish to make any statement before we get on with the deposition?

Mr. Jenks: I forget whether in the Federal Court a deposition has put in the usual stipulations that you do in the State Court, but I think it is in the Federal Rules that all objections except as to the form of the question are reserved. [2]

Mr. Yudkin: That is in the rules.

Mr. Jenkins: Do you want to add the stipulation that the deposition may be used even if not signed, provided Mr. Hogan has had an opportunity to sign it?

Mr. Troxel: Reasonable opportunity prior to the time of trial.

Mr. Jenks: That is right.

Mr. Yudkin: That is all right.

Mr. Jenks: Then I think I want to put in one other stipulation in accordance with our conversation: While this is being taken only in the case

(Deposition of William O. Hogan.)

instituted by the United States, is it stipulated that it may be used in the other case originally instituted by Mr. Leuschner in the State Court and later removed to the Federal Court?

Mr. Troxel: Now being Federal Number 35416.

Mr. Yudkin: That is all right.

Mr. DeLew: So stipulated.

Examination by Mr. Yudkin

Q. (By Mr. Yudkin): Do you want to give us your full name?

A. My name is William O. Hogan.

Q. Your present position?

A. Assistant Trust Officer at First Western Bank & Trust Company.

Q. How long have you held that position?

A. For nine years.

Mr. Jenks: I might make a statement for the record there, [3] Mr. Yudkin, so that it will be clear. The First Western Bank & Trust Company is the same corporation previously known as The San Francisco Bank. The San Francisco Bank, as I think we all know, operated in San Francisco under that name for many years. On November 9, 1954 it changed its name to First Western Bank & Trust Company, so when Mr. Hogan stated he had held that position nine years, it is true he has worked in that corporation but under two separate corporate names.

Q. (By Mr. Yudkin): Mr. Hogan, are you familiar with all the facts relating to the trust and

(Deposition of William O. Hogan.)

the operation thereof in so far as it concerns your bank?

Mr. Troxel: Would you like to specify which trust that is, for the reason, counsel, that there are quite a number of trusts in which my particular client and the bank are interested, some of which pertain not at all to the other party.

Mr. Jenks: I may say this, Mr. Yudkin, to help Mr. Troxel out and to help you out: There is more than one Leuschner trust. The trust which we are talking about is described as—how do you describe it, Mr. Hogan?

A. We generally identify it in our place as P-109.

Mr. Jenks: This trust was established by whom?

A. All of these trusts were established by the same Trustor.

Mr. Jenks: So you identify it as P-109?

A. Yes.

Q. (By Mr. Yudkin): Tell me, is that the one established on [4] April 16, 1941 by Ida Denicke Leuschner, or are there others in addition?

A. There are others that I believe may have been established on the same day, but this is the trust that is usually identified as the trust which has three beneficiaries, Erida L. Reichert, Richard Leuschner, Sr., and Lynne Leuschner.

Mr. Jenks: I believe just to clarify it, if I may, again, that Lynne Leuschner is the niece of Richard Leuschner, Sr. and Erida Leuschner Reichert.

A. That is right.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): Are there any other trusts administered by the bank in which Richard Leuschner, Sr. has any interest?

A. There is an unfunded insurance trust.

Q. What is it? Could you describe that, please?

A. It is a trust which was established many years ago wherein Leuschner deposited certain life insurance policies with us subject to an agreement which was written out. It is an unfunded trust, and whether the policies are still in force is something that we don't know. He pays the premiums.

Q. What is the role of the bank in that?

A. As Trustee, but the trust as it exists at the present time does not impose any trustee duties upon the bank other than to safekeep the insurance policies. We have no duty to see that the policies are paid up, and duties as a Trustee would only commence in the event of his death. [5]

Q. Who are the beneficiaries of the policies?

A. I would have to just go on knowledge and belief there; I believe that they are his two children and possibly whoever his wife is at the time of his death.

Q. Do you know, off hand, whether those are revocable or irrevocable policies; that is, whether he has the right to change the beneficiaries?

A. I believe he does.

Q. (By Mr. DeLew): Does not?

A. Does. But the facts might prove that I am mistaken.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): Do you know with which companies those policies are taken out?

A. No, I don't.

Q. You prepared the affidavit of March 29, 1956 in the matter of Leuschner vs. First Western Bank?

Mr. Jenks: I prepared it, Mr. Yudkin. Mr. Hogan signed it; I prepared it.

Q. (By Mr. Yudkin): Were those statements correct? A. Yes, they were.

Q. Are you familiar with another affidavit filed in this case by D. L. Anderson, Vice President and Senior Trust Officer of the bank?

Mr. Jenks: I also prepared that, Mr. Yudkin.

Q. (By Mr. Yudkin): I was asking, are you familiar with it?

A. I would have to see it to refresh my memory.
(Document shown to the witness.) [6]

A. I don't know, Mr. Yudkin.

Q. Do you want to read it? For the record, I just want to identify it as the affidavit executed on May 4, 1956.

Mr. Jenks: What do you want to use it for, Mr. Yudkin? I will stipulate that Mr. Anderson signed it and he is the Vice President and Senior Trust Officer. I believe Mr. Anderson signed it because Mr. Hogan was out of the bank at that time, either on vacation or home with a cold.

The Witness: When was this?

Mr. Jenks: May.

The Witness: On May 4th?

(Deposition of William O. Hogan.)

Mr. Jenks: Yes.

The Witness: Yes; I was out of town.

Mr. DeLew: In what action was that?

Mr. Yudkin: That was filed in this action.

Mr. DeLew: 35398.

Q. (By Mr. Yudkin): Would you read it, please? There appears to be an apparent discrepancy between the facts stated in that affidavit and the affidavit signed by yourself.

Mr. Jenks: I will state, Mr. Yudkin, that I do not believe there was any discrepancy between the affidavits. One affidavit signed by Mr. Hogan states that the bank has this money as Trustee; the other affidavits, more complete, points out that there are three trustees, which, as we all know, is the complete, accurate picture, but there are three Trustees. [7]

There is also, I believe, a difference in amount, if they state amounts, because of the different dates.

Mr. Yudkin: There is also a difference in that in Mr. Hogan's affidavit he states there was an amount due at the time of the levy, whereas in this affidavit of Anderson it is stated that there were no amounts due Leuschner at the time of the levy.

Mr. Jenks: It is a question of accounting procedure, Mr. Yudkin. Something comes in during the month. The levy was made July 27th, and under the Trust Department procedure payments are made to all income beneficiaries on the 30th of each month, so under the Trust Department ac-

(Deposition of William O. Hogan.)

counting procedure on the 27th there was no amount which on the 27th had been allocated to Mr. Leuschner. On the 27th there was income which had been received since the first of July but had not been allocated between the income beneficiaries.

Q. (By Mr. Yudkin): For the record, Mr. Hogan, will you explain to us just what the properties are that are in the trust. If there are too many, just name them by general category.

A. The properties consist of common stocks, preferred stocks, cash and real estate.

Q. In whose names are the stocks?

A. The stocks are liable to be—the certificates are liable to be registered three different ways. If we have had the certificate for an extended period of time during which [8] Armin Leuschner was alive, then the certificate would be registered in the name of the San Francisco Bank, Armin O. Leuschner, Richard D. Leuschner and Erida L. Reichert as Trustees of the trust created by Ida Denicke Leuschner on whatever date it is, April 21, 1941 I think is the date.

Mr. Jenks: That is one. Suppose you let him finish?

Mr. Yudkin: Yes.

A. Another set might—and I don't think that there are any certificates registered in this particular way—San Francisco Bank, Richard D. Leuschner, Erida L. Reichert as Trustees of the trust

(Deposition of William O. Hogan.)

created by Ida Denicke Leuschner, dated whatever the date of the agreement is.

Since 1955 the assets which have been acquired by the trust would be registered in the name of our nominee, which is the Montgomery Company.

Q. That is for trading purposes? A. Yes.

Q. Who holds the cash?

A. The cash is on deposit at the bank.

Q. At the First Western Bank? A. Yes.

Q. And that has been that way during the life of the trust? A. Yes.

Q. And when it was the San Francisco Bank?

A. Yes.

Mr. Jenks: Mr. Yudkin, in case you want to go into it—if not I will do it on cross examination—when he says the cash is on deposit with the bank, it is on deposit with the bank [9] in its corporate capacity. The Trust Department does not carry deposits—is not permitted to by law.

Q. (By Mr. Yudkin): Who receives the dividends on the stock? That is, are they sent to the bank? A. They are sent to the bank.

Q. And you actually receive the checks and process them and credit the account of the trust; is that correct? A. Yes.

Mr. Troxel: I think that calls for the conclusion of the witness as to who receives them. The bank receives them.

Mr. Yudkin: I mean physically.

Mr. Jenks: Physically the trust department receives them.

(Deposition of William O. Hogan.)

Q. (By Mr. Yudkin): In whose name is the real property? You said the Trust had some real property?

A. I believe it is in the name of the original Trustees.

Q. That is the first set of names you mentioned?

A. Yes; that includes Armin O. Leuschner.

Q. Does the real property produce income?

A. It produces gross income, but I believe that, as a general rule, it operates at a net loss.

Q. In other words, you actually receive nothing net from the real property; is that right?

A. Well, this property is all down in Merced, and it is a fig ranch. Though we receive—have on occasion been able to [10] harvest the crop and receive proceeds from the harvest of the crop, pre-harvesting costs and the taxes and the depreciation on the fig trees has resulted in a net operating loss of the ranch.

Q. Who receives the gross and pays out the costs?

Mr. Jenks: Again I think that calls for a conclusion.

Mr. Yudkin: Physically.

Mr. Jenks: I will stipulate with you, Mr. Yudkin, that all of the receipts come to the Trust Department. Now who receives it is a different question, because the stock certificates which are in the name of the four trustees, the dividend check is payable to the four of them.

Mr. Yudkin: Physically—

(Deposition of William O. Hogan.)

Mr. Jenks: If the stock certificates are in the name of the Montgomery Company, possibly the Montgomery Company receives it, but physically the income comes into the Trust Department of the bank. I will stipulate to that.

Mr. Troxel: I have no objection to that stipulation.

Mr. DeLew: None at all.

Q. (By Mr. Yudkin): Are there any agreements concerning this trust among the beneficiaries or the Trustees other than the trust agreement itself?

Mr. Jenks: If he knows. I wouldn't expect him to know what particular agreements the beneficiaries might have among themselves. [11]

Mr. Yudkin: I am just asking him if he knows of any.

A. I do not know of any agreements pertaining to this trust between any of the parties.

Q. In your affidavit you stated that Richard Leuschner became entitled to some moneys. Can you tell us just how you reached that conclusion?

Mr. Jenks: I told you I prepared it. I probably reached that conclusion.

Q. (By Mr. Yudkin): If you signed it, it must have been agreed to by you. How did you reach that conclusion?

A. Well, the Trust Agreement provides that the beneficiaries are each entitled to a certain proportion of the net income, so one would say ordinarily that as the income is received by the trustees the

(Deposition of William O. Hogan.)

beneficiaries are entitled to the accrued income to that point, minus any disbursements.

Mr. Jenks: May I suggest something? This is a wasting trust, is it not?

A. Theoretically it is a wasting trust.

Q. So that in addition to the net income the beneficiaries are also entitled each month to a portion of the principal? A. Yes.

Q. (By Mr. Yudkin): Would you say that is more or less automatic, depending upon the amount of the income and the value of the trust; that is, it is a matter of mathematics, is that correct, the amount that each beneficiary would be [12] entitled to each month out of the trust?

Mr. DeLew: Just a minute. I think I will object to that on the ground that the Trust Agreement itself speaks for itself as to the respective rights and interest in the trust. I don't think it is up to Mr. Hogan or to any of us to answer questions concerning that. You have got the trust instrument that determines all those things.

Mr. Yudkin: I was going into the operation of the trust. This trust instrument is dated in 1941.

Mr. Jenks: Mr. DeLew objects that that calls for a legal opinion on the part of the witness.

Mr. Yudkin: I wasn't asking for a legal conclusion; I was only asking as to how they operated.

Mr. DeLew: If you phrase it along those lines, I might withdraw the objection, or not have any; but if we are trying to construe the trust agreement, let's not do it.

(Deposition of William O. Hogan.)

Mr. Yudkin: No, I am not trying to construe it; I am just trying to get how this thing was being handled.

Q. When you say that a beneficiary was entitled to some money, isn't it true that your determination as to how much he would receive would follow from determining the rights he had under the trust and applying those rights to the amount of money available? Is that correct? A. Yes.

Q. Who did that,—the actual computations and so forth?

A. Well, the trust agreement provides that the beneficiaries shall receive a certain proportion of the net income, so in a particular month on the 30th of the month we are aware of what has actually been received by the bank for the account of that trust. So then we allocate it as follows: 40 per cent to Leuschner, 40 per cent to Mrs. Reichert, and 20 per cent to Lynne Leuschner.

Q. And that is done every month; is that correct?

A. Yes. At the same time, however, we reduce that amount by the amount of our fee which we take monthly.

Q. That is done automatically from month to month within the trust department of the bank; is that correct?

A. I would say it is an automatic computation.

Q. You haven't had any occasion in those computations and the payments resulting from those computations to consult with your co-trustees?

(Deposition of William O. Hogan.)

A. I have not, no.

Q. To your knowledge the bank has not?

A. I believe that the bank has, because in the inception of any trust there is a great deal of consultation as to when and how certain acts ought to be performed.

Q. But whatever those may have been at the inception of the trust, you are not aware of any consultations during the time that you have been in charge of this trust; is that correct? A. No.

Mr. Jenks: On what matters, Mr. Yudkin?

Mr. Yudkin: On this matter of payment and allocation that he just testified to. [14]

Mr. Jenks: I know there have been recent consultations of the three co-trustees on other matters.

Mr. Yudkin: No, I am just directing it to what he had testified to, the allocations.

Mr. Jenks: Once the co-trustees agreed as to the mathematics of how to compute the income they do not have to continue to agree each month, although I believe there are some trusts where the co-trustees do insist on signing the checks; isn't that right.

A. That is right.

Mr. Jenks: But not in most of them.

Mr. Yudkin: A levy was served upon you on July 22, 1955?

Mr. Jenks: The 27th.

Mr. Yudkin: The 22nd.

Mr. Jenks: The 27th, but I don't think it makes much difference.

(Deposition of William O. Hogan.)

The Witness: You mean that was served on the bank, don't you?

Mr. Yudkin: The bank or the trust department.

A. The actual levy—I presume that is what you are talking about—was served upon D. J. Flynn.

Mr. Jenks: It does say the 22nd.

Q. (By Mr. Yudkin): Who is Mr. Flynn?

A. Mr. Flynn is an Assistant Trust Officer.

Mr. Jenks: That is the levy, I think, Mr. Yudkin, if [15] we may identify it, on form 665-A addressed to Trust Officer, First Western (formerly San Francisco Bank), San Francisco, California; is that correct? That is what you are referring to?

Mr. Yudkin: That is correct.

Q. At the time that levy was served upon the bank Mr. Leuschner had the rights under this trust that you just spoke about and which was being administered by the bank as you stated—

Mr. Jenks: I object to the statement “administered by the bank”; administered by the three co-trustees.

Mr. Yudkin: Administered by the bank and the other trustees in the manner you stated; is that correct?

Mr. DeLew: Will you let me have that question read?

(Question read by reporter.)

Mr. DeLew: The question is, as I understand it, at this time, the time of the levy, all three trustees have these funds; is that your question?

(Deposition of William O. Hogan.)

Mr. Yudkin: I am directing it to his testimony as to how this thing was operating.

Mr. Jenks: As I understand the question, it is, did Mr. Leuschner at that time have rights under the trust.

Mr. DeLew: If that is the question, I have no objection.

Q. (By Mr. Yudkin): Is that correct?

A. Yes. [16]

Q. Are there occasions when the money is not paid directly to the beneficiaries, that is, on some months, and held by the bank?

A. No, to my knowledge there has never been a time when we have not paid the net income directly to the beneficiaries, except in this particular instance.

Q. At the time of the levy, then, the problem before the bank was simply whether or not to pay the United States or pay Mr. Leuschner, was that correct?

Mr. Jenks: I object to that as calling for a conclusion.

Mr. DeLew: I also object.

Mr. Troxel: For this reason, counsel: For the record, are you very willing to stipulate that there was never a service of the levy on any of the other co-trustees?

Mr. Yudkin: Well, to my knowledge I don't know that there was any service on them, so I will be prepared to stipulate, in case some collection

(Deposition of William O. Hogan.)

officer comes up with a long lost copy of the notice of levy.

Mr. Troxel: If he does, it will be most peculiar. They haven't seen it. If you wanted to ask this question: At the time of the levy, the problem was what to do? To that I will agree.

Mr. Yudkin: I will withdraw that other question.

Q. But for the levy upon the bank, this bank would have paid whatever income became due each month to Mr. Leuschner; is that correct? [17]

Mr. DeLew: Just a minute now. The witness has already testified that these funds were paid out of the trust on the 30th day of the month. This levy was made on the 22nd.

Mr. Yudkin: I am saying but for the levy of the 22nd.

Mr. DeLew: No money would have been paid on the 22nd.

Mr. Yudkin: No, but for that levy on the 22nd, the money would have been paid to Mr. Leuschner; isn't that correct?

Mr. Jenks: If you ask the question this way, I will have no objection; if the levy had not been served on the 22nd the three co-trustees, acting through the trust department of the First Western Bank & Trust would have paid Mr. Leuschner his share of the income and principal on July 30th.

Mr. Troxel: I don't think that is quite accurate either, counsel. I think that the three co-trustees would have paid the amount due Mr. Leuschner

(Deposition of William O. Hogan.)

as calculated by the Trust Department of the First Western Bank & Trust Company.

Q. (By Mr. Yudkin): Can I ask the question this way, now that we have gotten through with counsel testifying—I would like to put the question to him this way: But for the service of this levy on the 22nd, the bank, in the manner in which it was operating this trust in conjunction with the other trustees, would have made the payment to Mr. Leuschner on the 30th; is that correct?

A. That is right.

Q. And would have made the payments every month thereafter? [18]

A. Yes.

Mr. Jenks: As long as Mr. Leuschner is alive, and I think he is still alive.

Mr. Yudkin: Well, we assume that.

Q. I assume you do not have this available, but can you give me an approximation of the amount of money that was paid to Mr. Leuschner under this trust from January 7, 1952 until the date of the levy?

A. Well, the approximation would be pretty rough, but I would say that it would amount to about—I'm sorry I can't, because there were certain,——

Mr. Jenks: Can we do this: I will tell you what he does have, Mr. Yudkin; he can tell you how much money is now held that otherwise would have been paid to Mr. Leuschner since July 22nd. That figure we do have.

(Deposition of William O. Hogan.)

Mr. Yudkin: Can we agree on this: That you will supply the information.

Mr. DeLew: What is the materiality of it?

Mr. Jenks: The income is not the same each month.

Mr. Yudkin: I realize that.

The Witness: And it isn't the same each year, because many of these companies are growth companies which have increased their dividends during that period of which you speak.

(Discussion off the record.)

Mr. Yudkin: It is stipulated that that information will be furnished? [19]

Mr. Jenks: Subject to objections as to relevancy, materiality, etc.

Q. (By Mr. Yudkin): How much is now payable to Mr. Leuschner under the trust?

Mr. Jenks: By "now" will you accept September 30th?

Mr. Yudkin: All right.

A. Twelve thousand——

Mr. DeLew: Wait just a minute. You say "How much is now payable under the trust"?

Mr. Yudkin: How much is payable to Mr. Leuschner?

Mr. DeLew: Nothing is payable to him.

Mr. Yudkin: But for the levy.

Mr. DeLew: I am going to object to it unless your question is had the levy not been made how much would have been paid by all three trustees.

Mr. Jenks: I don't think we can get that figure

(Deposition of William O. Hogan.)

off-hand, Mr. DeLew; we can give the figure as to how much has been accumulated, which includes some savings account interest—not a great deal, but it does include \$65.60 savings account interest, because this money was placed in an interest-bearing account. We felt that whoever gets it should be entitled to interest on it instead of having it sitting in a commercial account not drawing interest. Frame it as you want it, but we do have the figure for September 30th as to the amount now held [20] by the trustees.

Mr. Yudkin: Can you give us that figure?

Mr. Troxel: Can we have the witness testify to the figure, please?

Mr. Yudkin: Right.

Mr. Troxel: So that if there is an answer given it will be one that is given by the witness.

Mr. Jenks: All right.

A. I believe it is \$12,026 and some odd cents.

Q. (By Mr. Yudkin): This is the figure held for Mr. Richard Leuschner but for our levy; is that correct?

Mr. Jenks: I think that calls for the conclusion of the witness.

Mr. Yudkin: Can you answer the question, please?

Mr. DeLew: Wait just a minute.

Mr. Jenks: I think it calls for a conclusion, and I object to the form of the question. We all know why it is being held, Mr. Yudkin; I don't think we have to put a legal——

(Deposition of William O. Hogan.)

Mr. Yudkin: Will you all stipulate that but for this levy the figure given would be paid to Mr. Leuschner? Will you stipulate to that?

Mr. Jenks: If you give us a release today, as far as I am concerned that figure would be paid to Mr. Leuschner; whether the co-trustees would agree or not I don't know; I can only assume they would. [21]

Mr. Yudkin: What would you say to that, Mr. Troxel?

Mr. Troxel: I would stipulate that the figure the witness testified to less the amount that is approved by reason of certain moneys being deposited in a savings account, is the total of the moneys that the bank acting as the computing and disbursing agent for the three trustees would have paid to Mr. Leuschner under the terms of the trust since the date of the levy to and including September 30th.

Mr. Yudkin: Will you stipulate to that, Mr. DeLew?

Mr. DeLew: The only thing I will stipulate to is that the three trustees have this sum of money on hand.

Mr. Yudkin: Payable to Mr. Leuschner?

Mr. DeLew: Not payable, no.

Mr. Yudkin: Whose is it?

Mr. Troxel: We don't know.

Mr. DeLew: That could have been paid to Mr. Leuschner. I say it is in the hands of the three trustees.

(Deposition of William O. Hogan.)

Mr. Jenks: I might put it in the record, Mr. Yudkin, that of course the Trust Department would expect to be reimbursed for its additional costs and attorney's fees in this litigation.

Mr. Troxel: That is correct as far as the attorneys for as Mrs. Erida Leuschner Reichert are concerned also.

Mr. DeLew: I might say we would be glad to get it.

Mr. Yudkin: I have no further questions. [22]

Mr. Jenks: Do you gentlemen have any questions? I think I should be the last one, being the attorney for the witness.

Mr. DeLew: Yes.

(Discussion off the record.)

Examination by Mr. DeLew

Q. (By Mr. DeLew): A while back, Mr. Hogan, when you were explaining in some degree the mechanics of the bank's operations, you mentioned there that as the income came to the hands of the Trust Department of the bank for the account of the three trustees, that it was deposited—and if I misstate you, correct me—that it was deposited to the credit of the Trustees with the bank; is that right? A. Yes.

Q. And the funds were held for the three trustees by the bank operating as a bank?

A. Yes.

Q. Following that you went on to say and explain some things concerning allocations, which I

(Deposition of William O. Hogan.)

am sorry missed me, went over my head; but is it not true that the manner in which any allocation of money was made by the Trust Department acting as Trustee and for the other Trustees, that the allocation was made at the time the checks went forward to the individual beneficiaries of the trust, and not before; is that not correct?

A. Allocation was made on the 30th of each month.

Q. And no allocation whatsoever was made with that income prior to that time? [23]

A. No, there was no occasion for us to compute that, nor do we keep it under a separate heading for each beneficiary.

Q. Prior to that time it merely remained on deposit to the credit of the trust itself?

A. That is right.

Mr. DeLew: That is all the questions I have.

Examination by Mr. Troxel

Q. (By Mr. Troxel): Mr. Hogan, you mentioned Armin O. Leuschner as a Trustee of this particular trust. Will you give me the reason that he is not acting as a Trustee now?

A. He died in, I believe it was May, of 1953.

Q. Then the three Trustees—the First Western Bank, Richard Denicke Leuschner, Sr., and Erida Leuschner Reichert,—are the successor Trustees or surviving Trustees of the trust? A. Yes.

Q. I believe you stated that these moneys—either you or your counsel testified; I don't know

(Deposition of William O. Hogan.)

which—that the moneys had been placed in a savings account which earned interest. Can you give me the title of the savings account in which these moneys that have been the subject of our discussion this afternoon were placed?

A. Without consulting the card I cannot, but I believe that they are in the name of the three Trustees.

Q. And was consultation had among the co-trustees of this trust prior to depositing these funds in the savings account?

Mr. Yudkin: I would object to that. Would he know? [24]

Mr. Jenks: If he knows.

Mr. Yudkin: That was not qualified.

Mr. Troxel: Among the three trustees is his own bank, and I believe he testified he has been handling the trust. If you know.

A. I believe not.

Mr. Troxel: I have no other questions at this time.

Mr. Jenks: Well all counsel stipulate that during the pendency of this litigation—and I can't recall whether it is three months ago or five months ago—I informed all counsel that the money was in a savings account, and that includes counsel for Mr. Leuschner, who is a beneficiary and trustee, counsel for Mrs. Reichert who is a trustee, and counsel for the Government.

(Discussion off the record.)

Mr. DeLew: That you told us what?

(Deposition of William O. Hogan.)

Mr. Jenks: In other words, the other trustees had notice that the funds were in the savings account.

The Witness: This is the \$12,000.

Mr. Jenks: As it has grown to \$12,000.

The Witness: \$12,000 payable to Leuschner.

Mr. DeLew: There is nothing said about being payable to Leuschner.

Mr. Jenks: The \$12,000 we have been talking about.

Mr. Troxel: Before I will stipulate to that, counsel, I will have to ask your client one question that I have avoided asking him. [25]

Mr. Jenks: All right.

Q. (By Mr. Troxel): Are the authorized signatures of all three trustees on the savings account signature card, if you know?

Q. The answer is "No, I don't know," or the answer is "No, the signatures are not there"?

A. The answer is no, the signatures are not there.

Mr. Troxel: I will stipulate that you told me that the bank intended to place it in a savings account.

Mr. Yudkin: Will you identify the money?

Mr. Troxel: This money that has been under discussion for 50 minutes.

Mr. Yudkin: Which everyone is trying to be very coy about identifying.

Mr. DeLew: It is identified as money in the savings account in the name of the trust.

(Deposition of William O. Hogan.)

Mr. Jenks: I will stipulate to one other thing, gentlemen. Mr. Hogan does not remember. Let's not have any quibbles here on the facts. The name of that account is "First Western Bank & Trust Company, T/U Leuschner Agreement, dated April 16, 1941, Richard Leuschner, Sr., Trust No. P-109-1-A." It is savings account No. 803406, and the heading of the card has the word "Remarks," and under there, if you gentlemen ever want to see the card, you will find the following: "For payable interest held a/c U. S. Treasury notice of levy."

It was opened on January 10, 1956.

Mr. Troxel: In other words the account is not in the name of the three trustees.

Mr. Jenks: I say that is the way the card reads.

Mr. Yudkin: I will stipulate that.

The Witness: I would like to say something else. That is the way the card reads, which is in the possession of the Trust Department. What the card says, in possession of the savings department is something I can only presume.

Q. (By Mr. Jenks): That is our card in the Trust Department? A. Yes.

Mr. DeLew: That doesn't mean anything; it is only your opinion.

The Witness: As to the savings department, in my opinion it is in the name of all the Trustees.

Mr. Troxel: This card reflects only the opinion of the trust department as to the title.

Mr. Jenks: It doesn't even reflect that; it is only a memorandum account.

(Deposition of William O. Hogan.)

Mr. Yudkin: I think we ought to go off the record.

(Discussion off the record.)

Q. (By Mr. DeLew): In other words, Mr. Hogan, the card referred to by Mr. Jenks a moment ago is not the account maintained by the First Western Bank operating as a bank and does not disclose the savings account to which reference has been made—does not disclose the names on that account to your knowledge? [27]

A. I don't know; it is simply a reference card.

Mr. Jenks: Any more questions, Mr. Troxel?

Mr. Troxel: I have no questions.

Mr. DeLew: I have none.

Examination by Mr. Jenks

Q. (By Mr. Jenks): Mr. Hogan, when you were asked about the mechanical operation of the bank, I believe you testified that when the income came in the trust department deposited that income with the bank in a commercial account in the name of the three trustees. Is that the procedure today? Is there a commercial account in the bank in the name of these three trustees, or in the name of any trustees?

A. Are we talking about the money as it comes in?

Q. A dividend, for example, that is made out to all the trustees, that money comes in; what does the Trust Department do with it today?

A. It credits those funds to the particular trust in question.

(Deposition of William O. Hogan.)

Q. That is in the Trust Department?

A. Yes.

Q. What do they do with the money? Does the Trust Department hold it on deposit?

A. The Trust Department has one large commercial account in which they deposit all funds which are allocated as income for all trusts in one commercial account.

Q. And how long has that procedure been in effect? [28]

A. I believe that procedure has been in effect since the first of 1955.

Mr. DeLew: May I just ask a question here?

Mr. Jenks: Yes.

Q. (By Mr. DeLew): That account that is maintained with the bank, do I understand you to mean that that account is just one large account for all the trusts maintained by the bank?

A. Yes.

Q. In other words, if you have a thousand trusts in San Francisco——

A. If we have a thousand trusts and we get a thousand checks today, all of those checks are actually deposited into one commercial account.

Q. One common account for the whole smear?

A. That is right.

Q. (By Mr. Jenks): Mr. Hogan, to straighten out one thing, it is not state-wide, is it?

A. No, it is an account which pertains to the trust activities at the San Francisco office.

(Deposition of William O. Hogan.)

Q. And other offices of the bank have their own trust activities? A. Yes.

Q. The Central Office in Oakland maintains a trust department, I believe?

A. They do, and they also operate under the same procedure.

Q. But when you say the income, checks, for all trusts are deposited in this commercial account, you are talking about all [29] trusts administered by the San Francisco office? A. Yes.

Q. And does that include more than San Francisco? A. No.

Q. Would Burlingame, for example, have its own trust department?

A. No; the First Western Bank has five local trust departments.

Q. The account which is maintained at the San Francisco main office at 405 Montgomery Street includes more than just that office; in other words, you have other banking offices in San Francisco and they do not maintain trusts or a commercial account of this character?

A. No, they do not.

Q. I think the question was asked about consulting with co-trustees. By the way, how long have you been administering this trust?

A. I have been administering this trust since February 15, 1954.

Q. And do you tie that to the date of the death of Jackson Baker, the former Trust Officer of the Bank? A. Yes, I do.

(Deposition of William O. Hogan.)

Q. During his lifetime Mr. Baker administered it? A. He did.

Q. Since you have been administering the trust have there been any matters to your knowledge where the co-trustees have been consulted?

Mr. Troxel: I think that is immaterial, counsel.

Mr. Jenks: I think he gave an answer to a question indicating that maybe they were not.

A. We have consulted with the co-trustees on so many occasions that I couldn't even approximate how many.

Q. In connection with this trust?

A. In connection with the trust.

Q. Can you give us a general idea of the type of problems as to which you consulted them?

A. We have consulted them on problems pertaining to the assets, whether they are to be—whether certain assets are to be retained or disposed of. We have consulted with them on problems pertaining to all phases of investments connected with the trust and the operation of the fir ranch. I suppose that covers generally what we talked about. There have been consultations which were irrelevant as to the trust in many respects, more of a personality standpoint.

Q. Mr. Hogan, you have been in the trust department of this bank or other banks for approximately how many years? A. For ten years.

Q. Ten years, all in San Francisco?

A. Yes.

Q. And can you tell us from your knowledge

(Deposition of William O. Hogan.)

of trust operations, whether in the mechanical or ministerial job of collecting and disbursing income it is customary for the bank to consult with co-trustees—any bank, your bank or other banks?

A. In the actual routine problem of [31] collecting the income and disbursing it, there would be very few occasions when you would have any need to consult with the trustees unless there was some problem involved in the collection of the income.

Q. As to the books of a trust where there are co-trustees and one of the trustees is a bank, is it customary for the books of the trust, its accounting records, to be kept by the bank? A. Yes.

Mr. Yudkin: May I interject? Is that true here?

A. Yes, it is; and in addition in this particular trust each of the trustees and the beneficiary of the trust, Lynne Leuschner, who is not a trustee, received a monthly accounting of income and disbursements.

Q. (By Mr. Jenks): You spoke of shares of stock in the names probably of the four original trustees; you doubt if there are any in the names of the three successors; you think there may be some in the name of Montgomery Company which is now used as a nominee. When the dividend checks on those stocks come in, can you tell us to whom they are payable, in other words, if the stock is in the name of the original four trustees?

A. Dividend checks are made payable to the registered owners of the certificates.

(Deposition of William O. Hogan.)

Q. In other words, if the four trustees are still the registered owner the dividend check would be payable to all four of them? [32] A. Yes.

Q. Who endorses that check?

A. We endorse those checks with a rubber stamp. That stamp says "Pay to the order of the within named payees. Absence of endorsement guaranteed by First Western Bank & Trust Company," or words to that effect.

Q. (By Mr. Troxel): Are you still endorsing checks made out to a deceased Trustee?

A. Presuming, Mr. Troxel, that we still have certificates in the name of Armin Leuschner — certificates wherein his name appears, the answer is yes, we do.

Mr. Jenks: Endorsing, Mr. Troxel, in the sense in which he says; no names are signed?

Mr. Troxel: Guaranteeing the endorsement.

Mr. Jenks: Meaning the endorsements are guaranteed but no names are signed. Isn't that the way I understood your testimony?

A. There are no names signed on the back of the checks.

Q. (By Mr. Troxel): You are maintaining an account card, in light of that rubber stamp, in the name of a deceased trustee. It is deposited to the credit "Of the within named payee;" this deceased trustee must have a card as trustee with your bank?

A. I would hate to get involved into a semantics discussion with you.

(Deposition of William O. Hogan.)

(Discussion off the record.) [33]

Mr. Jenks: I think that is all the questions I have.

Re-examination by Mr. Yudkin.

Mr. Yudkin: I just have a couple. I think this has gone too far anyway.

Q. When you spoke of this big commercial account that takes in deposits that come in for all the trusts in your office, how do you draw money out of that commercial account to be paid to the beneficiaries of this particular trust?

A. We draw it out by check.

Q. Upon the account payable to the beneficiary, and who signs that check?

A. The check is signed—I believe the bottom of the check requires a signature which is entitled “Authorized signature.” An authorized signature for the signing of checks of that nature would include any officers of the Trust Department in San Francisco and one or two clerks who have been appointed—who have been given that added authority.

Q. One of those names; is that correct?

A. One name.

Q. Was that the way checks were drawn payable to the beneficiaries of this trust up until the time we levied?

A. From the beginning of 1955 until that time is the way they were made up. Prior to that we had a different type of check.

Mr. Yudkin: I have no further questions.

(Deposition of William O. Hogan.)

Further Examination by Mr. Jenks

Q. (By Mr. Jenks): Mr. Hogan, that is true of every trust [34] that you operate, the same type of check is drawn on this same commercial account?

A. It is true with the exception of two trusts wherein the co-trustees have specifically requested that they be permitted to sign the checks also. In that case——

Q. Then as I understand it, the Trust Department has a commercial account with the bank like I personally might have?

A. That is correct.

Q. So the Trust Department owes money to someone and the Trust Department draws a check on its commercial account just like I draw a check on my commercial account to pay my bills?

A. Yes.

Q. (By Mr. Yudkin): In this trust is it correct that the co-trustees of the bank have not requested that their names be on the checks payable to these beneficiaries?

A. They have not requested it.

Q. And their names have not appeared?

A. No.

Mr. Yudkin: That is all.

Mr. Jenks: I do not have any further questions.

Mr. DeLew: I do not.

Mr. Troxel: No questions. [35]

[Endorsed]: Filed December 6, 1956.

[Title of District Court and Causes Nos. 35398-35416.]

REPORTER'S TRANSCRIPT

Hearing on Trial

Before: Hon. Willis W. Ritter, Judge.

Appearances: For the Government: Lloyd H. Burke, U. S. Attorney, Charles Elmer Collett, Assistant U. S. Attorney, by Anthony T. Dealy, Esq., and Godfrey L. Munter, Jr., Esq., Attorneys, Regional Counsel, Internal Revenue Service. For First Western Bank: Messrs. Orrick, Dahlquist, Herrington & Sutcliffe, by Christopher M. Jenks, Esq. For Richard D. Leuschner: M. Mitchell Bourquin, Esq., and George DeLew, Esq., by George DeLew, Esq. For Erida L. Reichert: Messrs. Slack & Zook, by John E. Troxel, Esq. [2]*

Thursday, March 7, 1957, 10:00 O'Clock A.M.

The Clerk: United States of America vs. First Western Bank and Trust Company.

Mr. Jenks: Ready, your Honor.

Mr. Dealy: Ready for the Government, your Honor.

Mr. Jenks: I think we have a question here as to how you want to proceed. I am Mr. Jenks representing First Western Bank and the Trust Company, which is a stakeholder, or one of the stakeholders, one of three trustees. Mr. Dealy represents the Government, who has a tax lien against Mr.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Richard Leuschner. Mr. DeLew, sitting at my right, represents the taxpayer. Behind him is Mr. Troxel who represents Mrs. Reichert, Mr. Leuschner's sister, who is also one of the trustees.

There are two cases, as your Honor probably has seen. There is the case of Leuschner vs. First Western, while it bears the higher number, was actually the earlier case. It was filed originally in the state court.

Mr. Dealy: Counsel, would you permit me to make the opening statement?

Mr. Jenks: I am just telling his Honor there are two cases and let him decide how to proceed.

The Court: Let me say at the outset I have not examined the file in these cases, I know nothing about them, so we will proceed from there. [3]

Mr. Jenks: I just want to tell you what the two cases are, and if Mr. Dealy feels that he should make the opening statement, I have no objection. That case was removed from the state court on March 28, I believe; following the procedure and some authorities, the First Western Bank interpleaded the Government. The Government then moved that case to this Court, but before it was moved the Government filed the case of United States vs. First Western Bank which I think they categorize as a penalty action in which the bank hadn't paid the money to them. That case was filed before the removal to the Federal Court, so that that case, although the second case in point of time, bears the lower number.

In that case Judge Hamlin of this Court per-

mitted us to bring in Mrs. Reichert, one of the other trustees, and the taxpayer as a third party defendant, and that's where we stand at the moment. The two cases have been consolidated for trial. I am not sure they are consolidated in the complete sense; in fact, I didn't move for a complete consolidation, I moved for a joint pre-trial hearing and the joint trial. Judge Harris, however, in announcing his ruling, called it a consolidation, so that's what the order calls for.

The Court: Well, don't you think, in view of what you told me, these two cases ought to be consolidated in the true sense of the word?

Mr. Jenks: I do; the Government contends no, because [4] they claim there is a different issue of law. In the case in which the Government is the plaintiff, U. S. vs. First Western, they claim that there is no defense to the action and that the question of Mr. Leuschner's right as a beneficiary in the spendthrift trust, and to the money in that trust, cannot be raised. We think it can, but the Government says it cannot.

The Court: In view of the nature of the cases, don't you think——

Mr. Dealy (Interrupting): Your Honor, there are two separate legal theories. One is that——

The Court: Well, I know, but the cases are so associated, aren't they, that we ought to hear them both together?

Mr. Dealy: Maybe heard together, your Honor, but not consolidate them in the true sense of the word, because one relates to a specific statute hav-

ing to do with a penalty against the bank. As to that action, that is between the United States and the bank. As to the other, the United States against the trust, against the beneficiary, or against the taxpayer, that is essentially the difference. One is for foreclosure of a lien against the property, the other is a penalty action.

Mr. DeLew: I must state they all involve the very same issues of facts, and that nearly the same issues of law.

The Court: Of course, Judge Hamlin already made the order consolidating them. [5]

Mr. Jenks: I would agree that the Government——

The Court: I guess there is nothing before me on that. The order consolidates them and there isn't anything here about raising the issues whether he ought not to have done it.

Mr. Jenks: I agree with Mr. Dealy's position to this extent: that if your Honor decides for the bank in the so-called penalty action, United States vs. First Western, that does not necessarily determine the issues in the other case. So there is that distinction, I will have to admit, but I think we all agree we should hear them together and brief them together. We can stipulate the facts should apply to both.

The Court: Well, now, what I would like you to do is acquaint me with what these are about.

Mr. Dealy: Your Honor, I was prepared to make the opening statement on behalf of the Gov-

ernment here, and I would like to at this time, if I may.

The Court: All right, go ahead.

Mr. Dealy: The parties have entered into a stipulation here which does cover both cases and is to be accorded the same effect in the two cases. It has been executed by all the attorneys and I would like now to submit it to the Court.

The Court: All right.

Mr. DeLew: Your Honor please, before we go further, just on this point, I want to make it clear, is it stipulated by all Counsel that this stipulation of facts applies to both cases? [6] You will note that it refers only to one, bears one civil number. It is fine with me, but if everybody stipulates to that I think it ought to be on the record.

Mr. Jenks: It was my understanding that it would apply to both, because it was typed late in the evening or in the afternoon by one of the lawyers instead of a stenographer. He didn't want to take the time and trouble of using both boxes, but I think we would all agree it applies to both cases.

Mr. DeLew: So stipulated.

The Court: Well, let the record show that everyone agrees.

Mr. Dealy: I believe I can acquaint the Court with the basic facts in this case. As some of the Counsel here will probably disagree with some of these remarks, but I believe in the main that any disagreement is a disagreement as to semantics and that this is what the Government feels the evidence will show.

In April of 1941, Ida D. Leuschner created a trust with three co-trustees. At all times relevant to both of these actions the First Western Bank and Trust Company, Richard D. Leuschner and Erida L. Reichert were the three co-trustees. At all times relevant herein the three beneficiaries of the trust were Richard D. Leuschner, Erida L. Reichert and Lynne Reichert—

Mr. Jenks: Lynne Leuschner. [7]

Mr. Dealy: All right, Lynne Leuschner.

In 1952 there were certain taxes assessed against Richard D. Leuschner, income taxes for the years 1943, 1944, 1945 and 1947. These assessments now total in excess of \$200,000 owing, and this matter is all set out in paragraph one of the stipulated facts.

The bank was the administrative trustee for the trusts in that it physically handled the property, collecting the income, paid the expenses, disbursed the dividends for the amount owing to the beneficiaries, and the disbursement was usually made at the end of the month, on the thirtieth day of the month.

As the income was received by the trust department of the bank, it deposited all of the income to the commercial account which the bank maintains or which the trust department maintains and in which all the income maintained by the bank go, and it was deposited in the name of the trust department, not in the name of the trust.

The levy was served on the bank July 22, 1955. The Internal Revenue Service served this levy on

the trust department of the First Western Bank seeking all property and rights to property of Richard D. Leuschner for application to the tax liability. This is all set out in paragraph two of the stipulation.

As appears in paragraph three of the stipulation, a [8] final demand was made on the bank on April 5, 1956.

Now, the First Western Bank and Trust Company has paid nothing to the United States under this levy and final demand, but has segregated the amounts which it would otherwise have paid to Richard D. Leuschner and at the present time totals approximately \$14,000. However, the bank has continued to make payments to the other beneficiaries of the trust in the usual manner. And so the segregation of funds applies only to the share of Richard D. Leuschner.

Now, there is no dispute, your Honor, as to the amount of money now held by the bank segregated for Richard D. Leuschner. The Government will accept the bank's figures on that, so as an accounting problem, there is nothing of that nature in this.

This trust, I might say, was a trust commonly known as a spendthrift trust, and it was also a wasting trust in that there were portions of capital or principal as well as income distributed.

In March of 1956 Richard D. Leuschner brought the first action here, which Mr. Jenks has mentioned today. He brought the action against the bank and the other trustees, claiming that the bank

held money due him, seeking to force the payment to him of this money. At that time the bank filed a cross complaint seeking to interplead the United States, naming the United States as a party. This action, incidentally, was filed [9] in the state court at which time, after the United States was named in the cross-complaint, the United States removed the action to this Court where in that action we now seek to foreclose the lien, the tax lien of the United States which we have against the property of Richard D. Leuschner. We seek to foreclose that lien against his money now held, or rather, against the interest of Richard D. Leuschner now held by the bank.

The following month, in April of 1956, the United States began a separate action against the bank to collect a penalty which is formally referred to under the 1939 Code as a 3710 penalty and has been provided for under the new Code as under section 6332 of the 1954 Code. Now, this action is brought under the new Code.

The penalty action is premised upon this theory, the section which was enacted by Congress, that when a levy is made by the United States upon a person or upon a company or bank that holds property of a taxpayer and is seeking to seize that property for the payment of taxes, to avoid unnecessary and controversial litigation without any merit, Congress provided that if the party failed to pay over what they held in their hands they were liable for a penalty, that penalty to be measured by the amount of the property or money that

they failed to pay over, and that action has nothing to do with foreclosure of a tax lien, it has nothing to do with anything else. It's merely a penalty against the bank measured by the amount that [10] they failed to pay over.

The Court: You mean the Government is entitled to get paid twice?

Mr. Dealy: We are stating, your Honor, that as a practical matter, the way this works the Internal Revenue Service has, as a policy matter, applied the penalty against the taxes and thus discharging that portion of that taxes, whatever it is. However, the Government does not contend that we are, in the penalty action, collecting any portion of the money held by the person who is holding it. We are levying a penalty completely separate. The statute is very clear on that.

Now, these matters have been consolidated for trial, or at least for joint hearing, if nothing else, and the Government's position is that by the service of the levy the Government seized all rights of Richard D. Leuschner under the trust and we are entitled to receive the monies that were payable or became payable to Richard D. Leuschner under the trust. In other words, we were seizing his property right in this trust, and the action of the bank in failing to pay over to the United States the money that they held then or they later segregated as payable to Richard D. Leuschner, was wrongful and subjected themselves to the liability of the 6332 penalty, as provided by Congress.

The Court: It reminds me a little bit, if I may

digress a moment, it reminds me a little bit about Governor Lee up in Utah. He had a bank account down at the Walker Bank and Trust Company. [11] He refused to pay his income taxes. And the Bureau sent one of these summary levies to take it out to the bank and pick up the bank account. The bank, when the agent showed up, called up Governor Lee and said there is an agent here to pick up your bank account. We want to let you know about it and we think we are under some obligation to do it and the bank doesn't want to suffer a penalty, so Governor Lee very graciously said, "Well, do whatever you need to do to protect the bank." So the Government picked up his income tax and that ended that.

Mr. Dealy: That, your Honor, in a nutshell, is precisely what the United States was trying to do here.

There is just one other point I would like to bring out right now for your Honor and that is that the bank contends that they are entitled to some of the accounts—I think maybe other Counsel than the bank, but certainly the bank contends that they are entitled to attorney's fees in this case for the reason that the trust instruments provide for attorney's fees where there is a dispute with regard to the trust. However, the United States does not feel they are entitled to anything, for the following reasons: We feel that in refusing to make payments to the United States under the levy the bank was acting on its own, in its own capacity, not on behalf of the trust, and it wasn't

in that case seeking to protect the trust because there was no justification for failing to honor the levy. [12]

The cases are clear on the fact that honoring the levy of this nature is a defense to subsequent payment to the holder of the bank account or the property or whatever it is. Certainly in that case, the bank being subject to the levy is not now entitled to come in and say, "Well, we were just seeking to protect the interests of the trust in refusing to honor the levy and that we are entitled to attorney's fees." If by creating the problem which we have here the bank can attorney-fee the fund to death I think the Court can see that whenever the United States makes a levy of this nature the bank's attorneys or anyone else interested could get a nice fee out of it by simply going to court and making a contest. For that reason the Government feels this is not——

The Court: Well, I wouldn't think that would be material unless you could prove that is what they do.

Mr. Dealy: Well, your Honor, I believe the fact that they failed to honor the levy in the face of the decisions which hold that they must honor the levy and by honoring the levy they have a defense to making subsequent payment indicates the bank did not have any justification for failing to honor the levy and therefore is entitled to no attorney's fees.

The Court: Well, I think I understand what your position is.

Mr. Dealy: I believe that is the Government's position in the case. [13]

Mr. Jenks: Your Honor please, I think at this point I should make the bank's position clear on certain matters, although your Honor will either want oral argument later or briefs. I believe at least the Government counsel is going to suggest briefs.

The Court: I might say at the outset I prefer to have it argued out orally.

Mr. Jenks: I prefer that myself.

The Court: I think when we have us all together here, anything that occurs to the Court he can ask about, and I have found in our adversary system, you know, we pit you two fellows together and you beat it out in argument, the Court can interject a question here and there, and pretty soon we see where the things lie, probably. I prefer to do it that way. If I take those briefs back in chambers and get to reading them, I might have a lot of questions about them and nobody there to answer them.

Mr. Jenks: I prefer it that way myself.

Mr. Dealy: In line with that, your Honor, the Government would like in any case to brief the matter for the Court, but we will be perfectly willing to argue the matter orally, but would like to request permission.

The Court: You can brief it if you want to, but I think we will arrive at our result right here in argument.

Mr. Jenks: In presenting the bank's position,

[14] your Honor, on the so-called penalty action, first I call your attention to the fact they insist it is a penalty and a penalty action; that immediately brings into play the fact that this statute must be strictly construed.

Now, the notice of levy here (you will find it attached to various pleadings) is not addressed to the three trustees and is not addressed to the bank. Remember, now, we have to construe these statutes strictly. It's addressed "Trust Officer, First Western Bank, formerly San Francisco Bank, San Francisco, California. Account trust in which Richard D. Leuschner is partial beneficiary."

The notice of Levy, as Counsel said,—

The Court: Let me get that straight before we go on. What is the name of the bank?

Mr. Jenks: First Western Bank and Trust Company; it used to be the San Francisco Bank.

The Court: At the time that is important in this case it was the First Western Bank and Trust Company, is that right?

Mr. Jenks: That is right. The point of this—there are two points. One, one if they are seeking or claiming that by this notice of levy they reached Mr. Leuschner's interest in the trust, as distinguished from any money which the bank might then hold, the point is, first, this wasn't even addressed to one of the co-trustees, it was addressed to an officer, trust officer. Second, it is an admitted fact that the other two [15] co-trustees did not receive a notice of levy. It will be argued, I know, by the attorney for the taxpayer as well as the

attorney for the other trustee, that they cannot seek a levy on an interest in the trust without serving the three co-trustees who hold that interest.

Admittedly, the bank, having the bookkeeping facilities right from the beginning of this trust, has collected the income and distributed it after having paid the expenses, distributed the net to the beneficiary. That's the first one we want to direct your attention to.

The Court: Yes.

Mr. Jenks: The second thing is this: This trust provides for monthly payments and from the inception those monthly payments have been made on the last banking day of the month.

The notice of levy was received by an assistant trust officer on July 22. It will be our position that at that time nothing was owed to Richard D. Leuschner. He is merely a life income beneficiary under this wasting trust. Although I use "life income" a small portion of the principal is distributed each year. Should Richard D. Leuschner have died on July 23, 24, or 25, no money would have become payable to him; it would have gone, under the terms of the trust, to the remainder of his children, so it will be our position on July 22 when the levy was received there was nothing held by [17] the bank for Richard Leuschner. There was a trust held by three co-trustees, but not by the bank.

The notice of levy itself reads as follows, your Honor:

"Accordingly, you are further notified that all

property, rights to property, monies, credits, and bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon * * *"

It will be our position, this having been served during the month, we didn't owe Richard Leuschner a cent. And it is our position that even if you can hold that the bank as one and only one of three trustees, held this inchoate interest of Richard Leuschner in the spendthrift trust, even if you can hold that this levy does not catch money which later became available — remember again, your Honor——

The Court: Will you read the language of that levy again?

Mr. Jenks: Yes, and I want to read the language of the final demand. The language of the levy:

"You are further notified that demand"——

The Court: This is addressed to the trust officer?

Mr. Jenks: The trust officer of the bank.

"Accordingly, you are further notified that all property, rights to property, monies, credits, and [17] bank deposits now in your possession and belonging to this taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized * * *"

Now, some months later, and on April 6, 1956,

after Mr. Leuschner had filed his own suit in the state court, after the government had been served with a notice of motion for permission to bring, to interplead them as cross-defendant, a final demand was served on the bank. The final demand was served, because under the terms of this penalty statute, section 6132 of the Revenue Code, the demand is a prerequisite to the suit against the stakeholder.

Now, I am going to read you the final demand, reminding you again that on July 22 the bank was not indebted to Richard Leuschner.

“Demand is again made for the amount set forth in the notice of levy, \$207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served.”

Now, that is the demand on which they have based this suit and under which they claim they are entitled to collect from the bank as a penalty fifteen, a little over \$15,000 to date.

I might say that when the levy was served we didn't owe [18] anything to Richard Leuschner, didn't owe him a dime unless he lived to the end of the month. When notice of demand was served April 6 we had a little over \$5,000 which had accumulated in those few months.

Now, looking at the statute itself I believe that the statute requires successive levies and does not permit a penalty action to recover funds which have accrued since the first levy. I base that not only on the language of the statute and the language of the demand, but upon this fact: The stat-

ute provides for the penalty that you pay to the government the amount of money which you had owing to the taxpayer at the date of levy with interest at six percent from the date of the levy, and it should be obvious to anyone that the \$600 or more which became payable to Richard Leuschner at the end of February cannot, under this statute, be subject to interest at six percent from the date of the levy on July 22nd, 1955. And the same is true of the money that became due in January, and right on back. So I say by the terms of this very penalty statute the only penalty is on what the bank had on July 22, which was nothing. That is admitted.

The question of attorney's fees comes up in two ways, your Honor. I was interested in the fact that Mr. Dealy said, apparently now admitting that the interpleader action initiated by Mr. Leuschner is proper, that in the interpleader action they will seek to foreclose the lien. [19]

Now, if we go into the interpleader action, if we were to deposit the money in court today, if we had deposited the money in court at any time during the past year and a half — we didn't because negotiations, we hoped this matter could wash itself out — if we had, and we have always said we are willing to, still willing, then as an interpleader matter, although there is slight authority to the contrary, we believe the great weight of the evidence of authority entitles us as interpleader stakeholders to attorney's fees out of this fund, attorney's fees and costs.

But there is another situation here and it also becomes a part of the penalty action. The trust agree-

ment itself provides that in the event of a controversy as to the trust or any shares thereof or portion thereof that the trustees are not required to determine that controversy and may withhold that share, withdraw it, until the rights to it have been determined legally and shall be entitled to all expense, including attorney's fees.

I think in the interpleader action the Court would have to allow the amount of attorney's fees. We haven't billed the bank yet. We felt, we wanted to be fair with everyone and present the matter to the Court. But I think if it is under the trust the Court merely says bill the bank and doesn't say attorney's fees.

I will tell you this, as I told Judge Harris the other [20] day in the pretrial, we have now put in in our office, mostly my own time, considerably over 100 hours. If I were billing the bank on this today I would bill \$3,500. I think my fee would be 130 or 135 hours. That would include my time and my associate who is in the courtroom. That would be the bill we would put in.

But I think that that provision of the trust is important not only as to attorneys' fees, but also on the penalty action. When the controversy arose the co-trustees under the terms of the trust were not required to determine the controversy, and until that time the controversy was determined no sum of money has become payable to Richard D. Leuschner, because the trustees are permitted, by the terms of their contract, not to pay until the controversy is decided.

So even if your Honor were to hold that the levy would tax future sums and that the bank must pay a penalty for failing to deliver those sums, if your Honor were to hold that, I think your Honor still must give judgment to the bank in the penalty action, because no sum has yet become payable to Richard D. Leuschner. There is still this controversy; there is still this controversy as to Richard D. Leuschner as beneficiary of the spendthrift trust. He certainly served notice on the bank that he felt that that trust was superior to the federal lien. He did that when he filed the first suit here, *Leuschner versus the bank*. [21]

I might point out, your Honor, that—I don't know what argument counsel will make—I know of cases one way and the other, and that is for them to decide, whether the spendthrift trust is good against the lien or not. That's not my problem. But Richard D. Leuschner, by filing the first action, said it was; he raised the controversy.

Now, from that point on, until that controversy was determined, nothing has become payable to him, and the government has said that the controversy will be determined in the interpleader action—Mr. Dealy just said that; that *Leuschner versus First Western versus the United States* they will seek to foreclose the tax lien. And at that point, if they succeed in foreclosing, the controversy will be determined, and for the first time since July 22, 1955, a sum of money will be payable to Richard D. Leuschner, but under the terms of the trust it is not payable to him.

I think this: If Mr. Leuschner were to die during this month—this isn't our problem—I think it may be payable to his estate, rather than to the remainder. But I don't have to cross that bridge here. It is the bank's position that we are purely the stakeholder; we are caught in the middle, one of three co-trustees of a spendthrift trust created by the mother.

I might add this: Somebody is going to have to tell you, we have a peculiar dollar situation here. The [22] government's lien is \$207,000, with interest at six percent, which is over \$12,000 a year. Payments to Mr. Leuschner have been running about \$8,000. So that if the government takes everything out of this spendthrift trust that could be payable, as Mr. Leuschner lives from month to month, it still will not pay the interest. The debt to the United States will still grow, and Mr. Leuschner will have to find some way of paying the tax on the income which the government takes out of the spendthrift trust.

I think with that kind of a controversy presented and first brought into court by the stakeholder in a case in which the United States is now a party, that there is no basis for the penalty action.

Now, you can give a stipulation of facts—I assume at this point you think there is no evidence. However, there is one point not covered by the stipulations, Mr. Dealy—I thought maybe you were going to call him—Mr. Hogan, the assistant trust officer who has been handling this trust is in court, and I believe somebody should call him as to the

exact amounts presently involved. If nobody else will, I will call him.

Mr. DeLew: Could I make a statement?

Mr. Jenks: All right.

Mr. DeLew: Before taking any evidence, whatever it may be, I thought it a good idea to make our opening statements [23] before there were any evidentiary matters, and I just want to state to you the position of Richard D. Leuschner.

His position in this matter is that of the taxpayer, or the alleged taxpayer. In the case involved here we say that no levies have been made at all; no effective levy has been made in this case of any kind. The statement of facts, the original of which you hold, has attached to it the original of what they are pleased to call "Notice of Levy." That is a notice designed to be what it says to be, a notice. It is not the levy. The method used by the government in this case to suggest a levy and which has been called both by counsel for the government and for the bank as a levy is not a levy at all, and the method used has been stricken down in three separate cases, which I will give you in due season.

Now, furthermore, as counsel for the bank has pointed out, the notice of levy, even as a notice, is directed only to "Trust Officer, First Western Bank." The trust instruments, which I don't think there is any disagreement about, and which is attached to the complaint, and we will give you another copy so that it is handy — attached to the complaint in the first of these suits sets forth quite definitely that the title to all property is in the trus-

tees therein mentioned, and today there are three trustees.

Furthermore, in order to maintain the action as against the government and the bank, under Code Section 6332 (b), [24] which is referred to in government's complaint, three conditions must be present: The person on whom a levy is attempted must be in possession of the property, a valid levy must be made, and the property sought must be subject to levy.

Now, the possession of trust property is in the trustees. I think it is Hornbrook law—I don't think anybody will dispute the fact that the possession of the property is in the hands of the trustees. It is true in this case that certain ministerial acts, as clerical acts, were performed. Actually, the funds consisted of a number of stocks in this case.

The Court: That is Hornbrook law, too, isn't it, that trustees may not delegate their responsibilities?

Mr. DeLew: I think that's correct. They cannot delegate it. It is just as if a clerk in my office wrote out checks; that doesn't put him in possession of the funds. And there I think the attempt to give the so-called notice of levy to a trust officer of one of the trustees is sufficient to destroy the effect of that levy.

Now, furthermore, as will be seen, the type of trust we have here is the so-called spendthrift type of trust. In other words, persons create this type of trust for improvident persons, and it cannot be alienated. You are quite familiar with that type of

thing, and I shan't go on. But it is a type of trust which is usually called a spendthrift trust, [25] and I think everyone will agree.

Now, under the Code section of this State, Section 859, it is there provided that where a trust is created to receive the rents and the profits of real and personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of a person for whose benefit the trust is created, is liable to the claims of the creditors of such persons.

Now, in this trust there is no provision in it for the accumulation of any income. As a matter of fact, there is a positive provision that the income be paid out. Obviously, in this case the education—our man in this case is 53 years of age; his education, well, we can forget that—the support is the portion that we are dealing with here.

Now, the support, the amount of the income and profits of this trust beyond the amount necessary for his support, and that includes support for himself and family, as the cases say, is available for creditors' claims such as that of the government.

Also, in this stipulation of facts you will note—it is in the last paragraph—that there it is provided that if Mr. Leuschner took the witness stand he would testify to the very same expenditures as provided for in an affidavit that has already been on file. That affidavit provides for [26] expenditures of approximately \$750 a month, which is a modest enough amount to get along on.

Now, if your Honor please, we claim that the spendthrift trust is not subject to the claim of the government under this Code section.

The Court: Because of the support provision?

Mr. DeLew: Because of the support provision of the Code, if your Honor please, and because——

The Court: This Code provision, I am not familiar with it, of course. I am familiar with spendthrift trust situations. Now, do you understand this Code provision to invalidate the spendthrift trust provision unless that is beyond the extent which the funds are necessary for education and support?

Mr. DeLew: Yes, your Honor.

The Court: That's the effect of it?

Mr. DeLew: Yes, your Honor.

The Court: So you stand or fall, so far as this point is concerned, upon the question of support?

Mr. DeLew: Yes, your Honor.

Now, furthermore, we claim this is a right of property, and that it must be respected by the United States, and we will get to that in due season.

Now, furthermore, it is the Defendant Leuschner's position in this case that he was adjudicated a bankrupt not so [27] long ago. Now, in the bankruptcy proceedings, when he filed his application for petition in bankruptcy—pardon me—he listed the government as a creditor. The government filed a creditor's claim. Furthermore, he listed the spendthrift trust in the petition and claimed it to be exempt.

Now, in due course, the trustee, who represents all the creditors, took issue with him on the ex-

emption claim by reason of this spendthrift trust.

The matter was heard before the Referee and it was decided in that case that the spendthrift trust was free of the claim of all the creditors, including that of the United States, because it was needed for his support. It was exempted under that provision of 859, and that judgment has become final.

The Court: Who determined that?

Mr. DeLew: The Referee, if your Honor please—the Referee in Bankruptcy, in the Bankruptcy Court, before a contested hearing in that place.

The Court: Bankruptcy in this court?

Mr. DeLew: Actually it was in the United States District Court, yes, but for the Southern District.

The Court: Southern District of——

Mr. DeLew: Of California.

The Court: ——California?

Mr. DeLew: Yes. I have the certified copy of the [28] proceedings.

The Court: All right.

Mr. DeLew: Now, we take the position that is res judicata here, has been estopped by judgment. The government was in the matter, they had filed claims. They did nothing. The matter could be appealed from. The government had a priority claim, as far as that is concerned, right there. They did nothing. And the cases will bear me out to the effect that that is res judicata and determinative of the issue here.

And with that, if your Honor please, I will close, at least this opening statement. Thank you.

Mr. Troxel: If your Honor please, on behalf of

Erida Leuschner Reichert, who is one of the co-trustees, I would like to state her position.

At the time that the notice of levy was first served on the trust officer of the First Western Bank Mr. Jenks, on behalf of the bank, telephoned our office, knowing that we were attorneys for Mrs. Reichert, and advised us that the notice of levy had been served, and at that time a decision was reached between the two offices that unless the levy was served on all three trustees that there would be no payment made to the United States, because it was our belief that the levy wasn't valid.

Immediately, at the same time, the information was passed [29] on to Mr. Leuschner, the beneficiary, and he informally demanded the payment to himself.

A controversy arose within the course of a day or so after the service of the original notice of levy, and we feel that a system which the government contends is valid, of serving one trustee and taking trust assets, because they have in their opening statement said that they want to obtain all of his right, title and interest in the trust, by serving a trust officer of a co-trustee, puts the trust situation in a very precarious position.

The controversy arose. The bank did its withholding in good faith, and all parties, the co-trustees, have been brought into this; my client was brought in without choice—she is a stakeholder as to her trustee interest; she offers to interplead, so filed an interpleader, and in the action moved successfully in the District Court here to have the

United States brought in as a third party defendant. We do wish to present to the Court that fact, that the controversy did arise under the terms of the trust agreement at the time that the levy was served and the discussions were had between the attorneys for the various trustees.

That is our position, and we will maintain that during the conduct of this proceeding.

The Court: Very well.

Mr. Dealy: Your Honor, on behalf of the government I [30] would like to call Mr. Hogan, who is one of the trust officers of the bank.

The Court: All right.

Mr. DeLew: Your Honor, please, — excuse me, Mr. Dealy—I have a little memorandum of points and authorities. May I submit these now for the Court's guidance?

The Court: Yes.

WILLIAM HOGAN

was called as a witness on behalf of the Government, and after being duly sworn, testified as follows:

The Clerk: Please state your name and occupation for the record.

The Witness: My name is William Hogan. I am assistant trust officer, First Western Bank and Trust Company.

Direct Examination

Q. (By Mr. Dealy): Mr. Hogan, how long have you been the assistant trust officer at the bank? A. Since 1947.

(Testimony of William Hogan.)

Q. How long have you been with the trust department of the bank?

A. Since 1946, in January.

Q. Are you familiar with the facts relating to the Leuschner trust which I believe the bank designates as "P-109"? A. Yes.

Q. That is the trust here in question, is that right? [31] A. Yes, it is.

Q. Would you describe to the Court the manner of the trust administration and the bank's position in the administration of the trust?

Mr. DeLew: If your Honor please, I think we ought to have at this point the trust in evidence, so that the testimony will make more sense.

Mr. Dealy: I believe—didn't you say the trust agreement is attached to the——

Mr. DeLew: To the complaint. But I think it ought to be in evidence at this time so the record will be clear as to the matters involved here.

Mr. Jenks: Attached to the complaint in the action of Leuschner against First Western Bank and Trust Company, No. 456,519.

The Court: All right, proceed with your examination.

Mr. Dealy: I don't feel there is any need to put it in evidence.

The Court: All right, proceed.

Mr. Dealy: Will the reporter repeat the question, please?

(Question read by the reporter.)

A. There are three trustees of the trust, but for

(Testimony of William Hogan.)

convenience purposes the bank has always collected the income, safeguarded the securities and disbursed the income at the last [32] business day of each month.

The bank has also initiated any portfolio changes in the trust.

You want more?

Q. (By Mr. Dealy): Would you describe the properties that are held by the trust?

A. In detail?

Q. Well, just the general type.

The Court: What classes of stock?

Q. (By Mr. Dealy): Stock, or bonds, or what?

A. Well, six percent of the—the trust has an approximate value of \$306,000. \$17,900 of value, or six percent of the trust, is in preferred stocks; 81 percent is in common stocks that have a value of approximately \$248,000. There is a promissory note secured by deed of trust which has a balance of approximately \$18,000; that comprises six percent of the trust. And there is real estate in Merced, California, approximate value \$20,000, which is about seven percent of the trust.

Q. Now, referring to the administration of the trust, did the bank collect the income from the trust properties? A. Yes.

Q. What did the bank do with that income?

A. When the income is received by the bank it is deposited to the account of this particular trust.

Q. The trust has a particular separate account?

A. On our books it does.

(Testimony of William Hogan.)

Q. What does the bank do with the money?

A. The bank has one commercial account in which all funds are deposited, but the trust department keeps a separate record for each trust.

Q. The trust department, itself, keeps a separate record for each trust, is that correct?

A. Yes.

Q. But the trust department deposits the money in the commercial account of the bank, is that correct?

A. Yes.

Q. Is there any segregation of the funds in the commercial account as belonging to any particular trust?

A. No, if one were to look at the commercial account which is maintained by the trust department they would probably find there is eight or nine million dollars in there. But the trust department knows how much of that money belongs to each account that it administers.

Q. Now, how does the bank pay out the dividends or proceeds to the beneficiaries?

A. On the last day of each month we disburse 40 percent to Mr.—under the terms of the trust 40 percent is supposed to go to Mr. Leuschner, 40 percent to Mrs. Reichert, and 20 percent to Miss Lynne Leuschner. [34]

Q. Is this done by check? A. Yes.

Q. Check of the bank? A. Yes.

Q. How are those checks drawn?

A. They are drawn against the commercial account.

(Testimony of William Hogan.)

Q. Who signs those checks?

A. Any authorized officer of the trust department may sign those checks.

Q. At the time these distributions are made are other trustees consulted?

A. No, but along with the check—the check is accompanied by a monthly report of receipts and disbursements.

Q. Was a notice of levy served on a trust officer or assistant officer of your bank on July 22, 1955?

A. Yes.

Q. Who was that officer?

A. Well, I think it was Mr. Flynn.

Mr. Jenks: I think he would recognize the person if you would show him the document.

Mr. Dealy: I don't have it here. That's all right; I believe it is Mr. Flynn. Yes.

Q. On the day of the levy where was this trust income that had been accumulated for the trust being held by the bank?

A. The money that had been accumulated since the 1st of [35] July was on deposit in that commercial account.

Q. All right. Was a final demand served on the bank? A. Well, I suppose it was.

Mr. DeLew: That is in the stipulated facts, your Honor.

Mr. Jenks: You might have a question of semantics there, as to serving the bank. It was directed to the trust officer, received by Mr. Hogan on April 6, 1956.

(Testimony of William Hogan.)

The Court: Also requires this witness to draw a conclusion of law as to whether it was a final demand.

Mr. Dealy: I can address the question. Was it served on Mr. Hogan?

The Court: Well, if it is covered by the stipulation, why bother with it?

Mr. Dealy: All right, your Honor.

Q. Now, between the date of the levy and the date of the final demand were payments made to the other beneficiaries of the trust? A. Yes.

Q. Was this in accord with the same practice of making out a check at the end of each month?

A. Yes.

Q. Now, what was done with the money that was allocated or segregated or set aside for Mr. Leuschner during that period? What was the procedure with that?

A. Well, first we simply set up what we called another cash [36] account.

Q. A what?

Mr. DeLew: We ought to set up the time element here. You mean immediately between the final demand and the levy?

Mr. Dealy: Between the date of the levy, July 22, 1955, from that day on, what was done with the money that was allocated for Mr. Leuschner?

Mr. DeLew: You mean the notice of levy.

Mr. Dealy: The notice of levy.

The Witness: In order to keep track of how much money we had not distributed to him we

(Testimony of William Hogan.)

would draw a check against—not draw a check; probably make some sort of a debit entry against the trust, and credit what we called “P-109 (a),” on which we had placed his name.

I think after a period of time when the money started to accumulate into a considerable amount we felt that perhaps we might be criticized if this money was not earning interest. So we placed it in a separate savings account in the bank, and every three months we distribute, or we deposit into that savings account the amount of funds which we have accumulated during that period in this so-called P-109 (a) account.

Q. (By Mr. Dealy): What is the reason for doing that every three months?

A. Well, it is for our convenience, and there would be no difference in the amount of interest that is paid. In other [37] words, if you were to make a deposit in any bank today you would not start to earn interest on it until April 1st.

Q. When this savings account was set up were the other trustees consulted?

Mr. Jenks: If you know.

A. I don't think they were consulted, but I think that they were informed, but I do not know for sure.

Q. (By Mr. Dealy): Can you state how much the present amount is now that this—at this time—that is now segregated to these—I suppose you have two accounts; you have a savings account and the other account, whatever it is?

(Testimony of William Hogan.)

A. Well, in the savings account there's a total of \$14,395.81.

The Court: This is our usual time to take the morning recess, if this is a good point at which to stop.

Mr. Dealy: If we can get these other figures.

A. (Continuing) In the commercial account there is in the so-called P-109 (a) account, there is \$1,263.74.

Mr. Dealy: All right, your Honor, I think this would be a fine place to take a break.

(Short recess.)

Q. (By Mr. Dealy): Resuming where we left off, Mr. Hogan, I think I have one, or possibly two more questions. Can you tell me, on July 22, 1955, the amount of money which was on the trust department books credited to the Leuschner trust [38] account in the commercial account?

A. No, I can't tell you how much was on deposit on that very day. But I do know that if this notice of levy had not been served, that on the 31st of July we would have sent Mr. Leuschner a check for \$687.67.

Q. But you do not know to the exact amount what was on file for the whole trust, is that correct?

A. Well, on the 31st—

Q. On that one day?

A. No, I'd have to get that information for you.

Mr. Dealy: I believe that will conclude the examination for the government.

(Testimony of William Hogan.)

Mr. Jenks: I have a couple of questions, your Honor.

Cross Examination

Q. (By Mr. Jenks): Mr. Hogan, I am looking at the agreement of trust dated the 16th day of April, 1941, by Ida Denicke Leuschner as trustor. I think we should identify some of the parties.

Is it correct that Ida Denicke Leuschner was the mother of Richard Leuschner and Mrs. Reichert?

A. Yes, that is correct.

Q. And I believe there was another child, Frederick Leuschner? A. Yes.

Q. Now, the original trustees were the bank, Armin O. [39] Leuschner, Erida Leuschner Reichert, and Richard D. Leuschner.

Is this correct: that Armin O. Leuschner was Mr. Leuschner's father?

A. Yes, sir.

Q. And he died? A. Yes.

Q. So that the present trustees are the bank, Mrs. Reichert, and Richard D. Leuschner?

A. Yes.

Q. Frederick Leuschner also died, did he not?

A. Yes.

Q. And he left a daughter, Lynne Leuschner?

A. Yes.

Q. So at the present the three beneficiaries are Erida Leuschner Reichert, both beneficiary and trustee, Richard D. Leuschner, both beneficiary and trustee, and Lynne Leuschner, who is only a beneficiary? A. Yes.

(Testimony of William Hogan.)

Q. Now, there was a reference made here today to the fact that this was a wasting trust. Can you tell us just how the wasting takes place in this trust?

A. I believe the trust instrument provided that on January 1st—that was ten years after the creation of the trust—that the trust was to be valued at that time; and then monthly we were to distribute one percent of the value of the trust [40] on that particular day, and I think it was January 1, 1951.

Q. In other words, each month, in addition to distributing income, you distribute one percent of the principal divided among the three beneficiaries?

A. Yes. There is a theoretical wasting of 12 percent of the value of the trust in 1951, each year.

Q. In other words, theoretically it is one percent a month, or twelve percent a year?

A. Yes.

Q. However, because of either fortuitious investment or the rising prices in the stock market, the net value has not wasted, has it?

A. No, the net value has increased, as a matter of fact.

Q. Has increased.

The Court: Might turn around any day.

Mr. Jenks: It might turn around sharply, your Honor.

Q. You spoke of real estate in Merced. That's a fig ranch?

A. Yes.

Q. What is commonly referred to as a fig ranch. Mr. Hogan, so far we sent you a bill for our legal

(Testimony of William Hogan.)

fees in this case, and it has been charged against the trust? A. I have not seen it.

Q. You haven't seen it. And it would go through your hands? A. Yes, I believe it would. [41]

The Court: Well, you stated you haven't billed.

Mr. Jenks: We haven't billed.

The Court: You have already stated that.

Mr. Jenks: That's right. I thought maybe they wanted the evidence.

Those are the only questions I have.

Mr. DeLew: May I ask a few questions?

The Court: Surely.

Cross Examination

Q. (By Mr. DeLew): This won't be long, Mr. Hogan. You testified that you were with the bank as assistant trust officer since 1947, is that correct?

A. Yes.

Q. How long have you been in charge of this particular trust, the Ida Denicke Leuschner trust?

A. Since February 15, 1954.

Q. That was following the date of Mr. Jackson Baker? A. That is the day he died.

Q. And Jackson Baker, the trust officer for the bank, was in charge of this particular trust?

A. Yes, he was.

Q. Prior to that time. Now, you made a statement that since you have been in active charge of this bank—that is, active charge of this trust, and that has been since 1954, you initiate portfolio changes. Did I quote you correctly? [42]

(Testimony of William Hogan.)

A. I said that.

Q. Yes. Now, by "portfolio changes," you refer to the list of stocks and bonds that are in this trust, is that not right?

A. Well, let me put it this way: We have a trust investment committee.

Q. Yes.

A. And this trust is reviewed periodically. It is also subject to special reviews. If there is a time when we can see that there will be a need to raise additional funds to meet these principal distributions, why, it comes before the committee once again, and we will make certain recommendations that something should be sold or something should be purchased. But before we do anything, that simply is the committee's recommendation, we then communicate in writing with each of our co-trustees and inform them that our committee has recommended this particular change, and we would be pleased to have them concur with the recommendation. Nothing is done until we have the consent of at least two of the three trustees.

Q. I see. Then I can make the statement that you consult with the other trustees before making any change in the trust investments?

A. Yes.

Q. And they all consist of stocks and bonds. So the income [43] merely is by means of dividends or clipping coupons?

A. And also there is the——

Q. Except the fig ranch in Modesto?

(Testimony of William Hogan.)

A. Yes.

Q. That is actually running at a net loss, isn't that right?

A. Well, last year on the basis of the figures that we had it made \$87.00, and we presume we will receive additional funds when certain dried figs are paid for.

The Court: Like my cattle ranch in Idaho.

Mr. DeLew: I think I would rather have a cattle ranch.

The Court: The loss is greater. I should think you would make money on the fig ranch.

The Witness: Well, people don't like figs too well.

Q. (By Mr. DeLew): Now, if the trustees refuse to give this consent to the change in the portfolio—that is, the selling or purchasing of additional securities—does the bank purchase or sell them, anyway?

A. Not on our own, we do not.

Q. Where does Mrs. Erida Reichert live?

A. She lives in Maui, the Hawaiian Islands.

Q. Mr. Richard Leuschner lives——?

A. Down in Merced.

Q. That is the means you have all adopted to communicate and consult with one another, this medium of correspondence? [44]

A. Yes. But that is not the exclusive means. There have been occasions when we have had conversations either on the telephone or in the office of the bank. And Mrs. Reichert is only a recent

(Testimony of William Hogan.)

resident of the Hawaiian Islands, and she does travel back and forth on occasion, so we see her personally.

Q. In other words, there are consultations between you and the other trustees before you make any changes or any vital, any important, changes in the trust whatsoever? A. Yes.

Mr. DeLew: Thank you.

The Court: My understanding of the law is that all three trustees must concur. Don't you agree?

Mr. Jenks: Not under the California law.

The Court: Not under the California law?

Mr. Jenks: No; a majority, two out of the three.

The Court: Oh, I see. You must be sure and tell me about the California law.

Mr. Jenks: Two out of three.

Mr. Dealy: No further questions.

The Court: All right.

Mr. Jenks: Thank you, Mr. Hogan.

(Witness excused.)

The Court: That is by virtue of the Code?

Mr. Jenks: Except possibly, if your Honor wishes testimony as to the amount of time our office has put in on this [45] matter.

Mr. DeLew: Well, the judge just said the record is closed.

The Court: No, no. I said by virtue—the trustees being able, by a majority, to run the business, that is by virtue of the Code provision.

Mr. Jenks: The Code provision, yes, your Honor.

The Court: I see.

Mr. Jenks: As far as I know, the only other possible evidence here would be evidence from our office as to the amount of time we have put in.

The Court: Well, suppose we defer that for awhile. I don't mean by that to suggest we have made up our minds about it at all.

Mr. Jenks: All right, your Honor.

Mr. Dealy: We have no further evidence, your Honor.

The Court: All right.

Mr. DeLew: Your Honor please, I have just once piece of evidence, if Mr. Leuschner will take the stand for just a moment.

The Court: All right.

RICHARD D. LEUSCHNER

was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. DeLew): Mr. Leuschner, you are the plaintiff in the first of these two suits, and one of the third party defendants in the other suit, is that not right? A. Yes.

The Court: Your name is Richard D. Leuschner?

A. Richard D. Leuschner, yes, your Honor.

Q. (By Mr. DeLew): Now, you have prepared and filed with this Court an affidavit dated May 17—sworn to on May 17, 1956, in which you indicate a total of \$750 is necessary for your support. Do you recall such an affidavit?

(Testimony of Richard D. Leuschner.)

A. Yes.

Mr. DeLew: Now, if your Honor please, I am not introducing that in evidence at this time, although I have a copy for your Honor's perusal. The reason I am not doing that is because it is in the brief statement of facts. And I just want to ask one question. The brief statement of facts mentioned that Mr. Leuschner, if he took the witness stand, he would testify to the same items. I think there is no opposition to that, as to the validity of those items. But I notice in reading the affidavit I left out one important portion, and that is:

Q. Are those expenditures necessary for the support of yourself and your wife?

A. Yes, we have no other means. [47]

Q. And your family consists of only yourself and your wife?

A. Yes.

Q. You have no employment at this time?

A. No. I am trying to get work appraising, but I have to do a lot of studying at it, and I have little or no income from it at this time.

Q. Now, do you expect your expenditures, the sums necessary for your support, to increase or decrease as time goes on?

A. They will increase by reason of the cancer condition—arthritis condition of my wife.

Q. You say your wife has cancer?

A. Yes. That is, I believe, in the affidavit. And I have a further doctor's statement. That affidavit is about a year old, and I have a further doctor's

(Testimony of Richard D. Leuschner.)

statement I would like to refer to, as to the progress of her condition since that affidavit was signed.

Q. Mr. Leuschner, I don't believe that would be admitted. You can just tell us your wife's condition, why that would have an effect on you.

The Court: Well, maybe counsel will stipulate to this doctor's statement with you that it may be received, although it is hearsay. I don't know whether they will or not. You might ask them.

Mr. DeLew: Will you so stipulate? I don't believe you [48] have seen it, for one thing.

Mr. Dealy: Counsel, I was about to ask what materiality this has to this case.

The Court: Well, it is corroborative of his need for this amount for his support.

Mr. DeLew: Yes, it is just further evidence along that line.

The Court: It's all in the statement.

Mr. Dealy: We will admit the document, your Honor, for what it purports to be, but we do not concede it has any materiality.

The Court: That is to say, you don't raise the question it is hearsay?

Mr. Dealy: We will pass that, your Honor.

The Court: All right.

Mr. DeLew: I will offer it at this time, if your Honor please.

The Court: Let me see it.

Mr. DeLew: Oh, surely.

The Court: The objection as to materiality is

(Testimony of Richard D. Leuschner.)

overruled. The exhibit is received, and give it a number.

The Clerk: Defendants' Exhibit A.

(The affidavit referred to was marked Defendants' Exhibit A in evidence.)

DEFENDANTS' EXHIBIT "A"

Edward A. Jackson, M.D., F.A.C.S.

2630 M Street

Merced, California

February 25, 1957

Honorable Judge United States District Court
San Francisco, California

Gentlemen: RE: Mrs. R. D. Leuschner

For the past year this lady has had severe rheumatoid arthritis of various joints of the body. This is becoming progressively more deforming in spite of using injections of acth and various cortisone products by mouth.

This is now reaching the stage where she has to have help in dressing herself and if this condition continues, it will be necessary for her to have care in a convalescing hospital. The cost at a convalescing hospital is at least \$250.00 a month.

Yours truly,

/s/ Edward A. Jackson, M.D.

EAJ:MC

[Endorsed]: Filed March 7, 1957.

(Testimony of Richard D. Leuschner.)

Mr. DeLew: Now, for the record, if your Honor please, [49] I mentioned this two or three times, but I would like—I don't think it has been stipulated, or anything done about it—I would like to introduce at this time the trust agreement of the Ida Denicke Leuschner trust.

The Court: All right.

Mr. DeLew: Will you all stipulate to that?

Mr. Dealy: I think your Honor has already covered that. It is attached to the complaint in the action.

Mr. DeLew: I am asking that it be brought into evidence.

The Court: All right.

Mr. Dealy: All right, no objection.

The Court: Do you have a copy there, or do you want the copy attached to the complaint to be marked and received?

Mr. DeLew: Well, may we mark and receive that, if your Honor please, because it is a long document.

The Clerk: Defendants' Exhibit B in evidence.

The Court: You offer it, do you?

Mr. DeLew: Yes, your Honor.

The Court: Do you have any objection?

Mr. Dealy: No, your Honor.

The Court: It is received in evidence.

(The trust agreement referred to was marked Defendants' Exhibit B in evidence.)

Q. (By Mr. DeLew): Mr. Leuschner, as one of the co-trustees [50] of this trust, have you had

(Testimony of Richard D. Leuschner.)

occasion from time to time to consult with your other co-trustees, including the First Western Bank or its predecessor, the San Francisco Bank, in connection with the operation of this trust?

A. Yes, ever since 1941, sometimes twice a month, sometimes three or four times a year, just when any business had to be transacted, I traveled to San Francisco and met with Mr. Baker, or later Mr. Hogan or Mr. Anderson, Mr. Hogan's superior, representing the bank, and I had correspondence with my sister, and I believe a year ago I have a confirmation of a general meeting that was held by all the trustees and some of the beneficiaries when some particular point had to be decided.

Mr. DeLew: That's all.

Mr. Dealy: We have no questions, your Honor.

The Court: That will be all.

(Witness excused.)

Mr. Jenks: Your Honor please, as long as we are placing in evidence some of the documents that have been attached to the pleadings, the trust as one of them, I would suggest we place in evidence a photocopy of the notice of levy and photocopy of the final demand.

Mr. Dealy: I believe they are in the stipulated facts.

Mr. Jenks: Are they attached?

Mr. Dealy: Yes. [51]

Mr. Jenks: I didn't realize that.

Then I don't think we need it, your Honor.

The Court: All right.

Mr. DeLew: Shall I go on with my testimony?

The Court: Yes.

Mr. DeLew: I would like at this time, on behalf of Defendant Leuschner, to introduce a number of documents dealing with the bankruptcy matter. If your Honor please, they are all certified copies.

Does counsel wish to look at them?

Mr. Dealy: Yes. We haven't seen them at all.

Mr. DeLew: I was going to wait to the noon recess for that, your Honor, but I thought I would put it in now.

The Court: You imagine we can work this out this afternoon, or will this require more time than that?

Mr. Jenks: As far as I am concerned, my argument will be quite brief and certainly can be summarized in previous statements I have made, your Honor.

Mr. DeLew: I think it can be worked out this afternoon, Judge.

The Court: That would be my objective, to try to reach a decision in this matter by the close of the business day.

Mr. Dealy: Your Honor, as your Honor knows, I have been tied up with another case. I have not had a chance to prepare this matter thoroughly, and I would request decision [52] be withheld until the matter can be briefed on behalf of the government. As late as just last week this matter of the bankruptcy was brought up, and as you know, I have been preparing and trying this other case, and I haven't had the chance to have the research

done for me or do it myself on this question of bankruptcy.

The Court: Well, I won't make any ruling this morning about that one way or the other. Let's see where we get this afternoon, take it up as we go. This may have considerable clarification before we get through with it today.

Mr. Dealy: Now, with regard to these documents, your Honor, we held a two-hour conference—my co-counsel here held a two-hour conference with these counsel last week on this case, and at that time we were not shown these documents, we were not asked to stipulate to their admission, and therefore we object to it, because frankly, one of the documents here is a brief, a trustee's brief. We don't know who the trustee was, and we fail to see what materiality that has with this case, and frankly we do not agree to the introduction of these documents as certified copies. We do not have any way of knowing the authenticity.

Mr. DeLew: They are certified copies, if your Honor please.

The Court: They are records of the proceedings in the Bankruptcy Court, are they? [53]

Mr. DeLew: Yes, all certified copies.

Mr. Dealy: We have never seen the records of the proceedings. We don't know whether they are complete or not.

The Court: I will give you an opportunity to check on them, I suppose, and you can point out anything you wish to.

Mr. Dealy: The records are in the Southern District of California.

Mr. DeLew: I had to get them.

Mr. Dealy: Well, as I pointed out to your Honor, if counsel had brought up this last week we would have had a chance to go to the records and check them.

The Court: How long have you known about this bankruptcy proceeding?

Mr. DeLew: They filed a claim in the bankruptcy proceeding, Judge; filed a claim two years ago.

Mr. Dealy: The department that was maintaining this action did not know about the bankruptcy proceeding, to my knowledge, until Wednesday of last week.

The Court: Who filed a claim in the bankruptcy proceeding two years ago?

Mr. DeLew: It was the District Director of the Internal Revenue, and these gentlemen represented the District Director.

Mr. Dealy: Which district?

Mr. DeLew: This district. Whoever he was—I thought he was up here. [54]

Now, this was filed, Judge, on January 10, 1956.

The Court: I would suppose the Internal Revenue Service file on this matter would contain these records.

Mr. Dealy: No, your Honor, we have the file, or we have been provided with what the service said was the file, and to our knowledge there was no

bankruptcy proceeding, and there was no claim, as far as we know.

The Court: Tell me this: Who was the judge that pretried this matter?

Mr. Jenks: Judge Harris.

The Court: Did Judge Harris, in his pretrial order, make any order about the presentation of documents?

Mr. Dealy: No, your Honor.

The Court: That they would not be received?

Mr. Dealy: No, your Honor.

Mr. DeLew: Some of these I only got this morning.

The Court: Well, it's open to offer them. I don't suppose you could object to them on the ground they weren't shown you before.

Mr. Dealy: We do object on that ground, and on the ground that we weren't asked last week at the stipulation.

Mr. DeLew: Wait a minute. When we sat down for these stipulations counsel came—Mr. Munter came into the stipulation with a prepared set of facts for us to sit down and sign. It took us until five o'clock to change that, because there [55] were so many disagreeable things in there, and it took us until five o'clock, Judge. We had no chance to present our side—nothing on our side.

Mr. Munter: I want to take exception to that.

The Court: Gentlemen—now, gentlemen! One of the things I insist upon is that if counsel has anything to say, that they address their remarks to the Court. I am not going to let you get into

any "Donnybrook" about this, not just yet, at any rate.

Mr. DeLew: Judge, these were all court records.

The Court: Yes, I think I understand what they are. Are you having them marked separately, or together?

Mr. DeLew: I think we can mark them all together.

The Court: Well, I am not so sure about that. Counsel says there is a trustee's brief in there.

Mr. Dealy: Are you going to allow the brief in there, your Honor?

The Court: One of the court records now that you need.

Mr. DeLew: All right.

First of all, if your Honor please, I want to introduce the statement of the bankrupt which shows the claim of the bankrupt here in issue, certified.

The Court: I know, but you said the Referee in Bankruptcy, the judge of the Bankruptcy Court down there, had adjudicated this matter. [56]

Mr. DeLew: Yes, Judge. Just wanted to give you these in order.

The Court: I see. All right.

Mr. DeLew: Then I have the trustee's report of exempt property where he denied the exemption of the spendthrift trust.

The Court: What do you say about this? I don't catch the significance of this. You say the exemption was denied?

Mr. DeLew: Yes, Judge. The reason I put

that in, that is how the matter arose in the Bankruptcy Court. It was after the denial of that.

The the next document I was going to introduce——

The Court: This also recites that this income for spendthrift trust, No. P-109, administered by First Western Bank and Trust Company, San Francisco, approximately \$3,000 per year already held exempt from levy of execution in Schmidt Lithograph against Bear Creek Company.

Mr. DeLew: I don't think that is important, except up above there——

The Court: That is of no significance here.

Mr. DeLew: Up above there where it says——

The Court: The trustee says the exemption asked for the above-named bankrupt in his Bankruptcy Schedule D-5 is denied.

Mr. DeLew: Yes; that creates the issue.

The Court: All right. [57]

Mr. DeLew: But I thought I would present it, and this is the objection to the trustee's report of exempt property.

The Court: Robinson represented whom?

Mr. DeLew: Mr. Leuschner.

Then I have here, if your Honor please, the claim of the United States for the very same taxes that are here in issue.

Now, I have here the trustee's brief on the question of denial of exemption as to spendthrift trust. If counsel objects to that I won't put it in.

Mr. Dealy: We do.

The Court: All right.

Mr. DeLew: All right.

Here are the findings of fact and conclusions of law, and the final order of the Referee in Bankruptcy. I have here the docket entry showing the entry of those findings of fact and judgment and order, and the fact that no appeal was taken from that order, telling us that it was and is a final order in bankruptcy.

The Court: It sustained the objection to the trustee's return of exemptions, and held the trust exempt.

Mr. DeLew: Yes, Judge, as to all claims. And the docket entries indicate, show that there was no appeal taken from that order. I think that's all there is to it.

The Court: They can be all marked together, but we will [58] not receive that brief.

The Clerk: Defendants' Exhibit C in evidence.

(The certified copy of the bankruptcy proceedings referred to was marked Defendants' Exhibit C in evidence.)

Mr. Dealy: The government objects on the ground of lack of foundation. We do not know what these purport to be are what they purport to be, and we have not had an opportunity to consult the file and see how these documents relate to other documents in the file. This is not the whole bankruptcy file.

Mr. DeLew: Only the pertinent part.

The Court: Under the statute if these are properly exemplified, come out of the office down there in the Southern District, how can you oppose them

on the ground that they are not authenticated, counsel?

Mr. Dealy: We have no showing, your Honor, that they are properly identified.

Mr. DeLew: All certified.

The Court: They are all certified.

Mr. DeLew: Right on the face of it.

Mr. Dealy: Stamp and signature, that's all. We have no knowledge of who the officer is that signed it; there is no showing that he was who he purports to be.

The Court: Well, if the basis of your objection is going to be formal, I shall give counsel an opportunity to [59] have them properly exemplified, brought up here. I don't believe we ought to decide this case on merely a formal objection. This is a serious matter; this may be adjudicated down there, you know. If it is adjudicated, I want to give them an opportunity to prove it.

Now, I should think that during the noon recess, Mr. Dealy, I believe that you fellows ought, through the noon hour, to be able to check up on these any way you want to.

Mr. Dealy: We have no way, your Honor. The file is, I take it, in Los Angeles.

Mr. DeLew: The file is in Fresno.

Mr. Dealy: In Fresno.

The Court: You can't tell me that the Internal Revenue Service and the Department of Justice is so lacking in facilities in the State of California that they can't get somebody down there in Fresno,

in the next couple of hours, to go over and verify these facts.

Mr. Jenks: It is a four-hour drive; be about a two-hour 'plane trip.

The Court: I am not talking about that. There must be somebody in the Internal Revenue Service down there in Fresno.

Mr. Dealy: That would assume we have an agent there, that is, that we can contact in two hours, that we can get to go to the Courthouse, or to the court offices, to check the file and call us back. I doubt very much that they have any [60] agent there.

The Court: I won't require you to do it in two hours if you can't do it, but wouldn't you like to make the attempt?

Mr. Dealy: We can call the Director's office here and see if they have an agent there, your Honor, but beyond that——

The Court: How big a town is Fresno?

Mr. Dealy: I haven't the faintest idea.

Mr. DeLew: Seventy-five thousand, probably.

Mr. Munter: If your Honor please, we have a collection office down there, but we have no lawyers in the Department of Justice here, nor in the Internal Revenue Service, and I think it would require a lawyer to examine that file.

The Court: I am not going to require you to do it in two hours.

Mr. Dealy: Normally, your Honor, we would ask a collection officer or an agent, not a lawyer, to

obtain a copy of the file, should we consider we need it for the purposes of this action.

The Court: Well, now, counsel, one time I was in a lawsuit before I went on the bench, and I got in a real hole in that lawsuit. It was in the Federal District Court in Utah before my predecessor up there, who stayed on the bench until he was 92 years old, thereby gave me an opportunity to be a successor. And late in the trial it became evident to everybody that I needed the articles of incorporation of a Delaware [61] corporation, Dover, Delaware. It's a long way from Salt Lake City to Dover, Delaware. And the Federal judge was crotchety about that; he wasn't going to continue the matter at all.

Now, you are not nearly in as bad a hole as that. You're in no hole with me at all; I am going to give you some time, if necessary.

We got those articles out of Dover, Delaware, by telephone and air mail.

Now, I don't see why you can't, by telephone and air mail, or ordinary mail, verify these things, and if you find anything wrong with this, why, let me know about it.

Mr. Dealy: Well, as I see it now, your Honor, the most we can do is call down there and find out if this——

The Court: Are these certified out of the office?

Mr. DeLew: They are all certified, Judge, and Mr. Leuschner was there when they did the certifying. He can take the stand.

The Court: He was there, you say?

Mr. DeLew: Yes.

The Court: Of course, these are photostats.

Mr. DeLew: Yes. There can't be anything wrong with most of those.

The Court: Well, as I understand the statute which concerns the admissibility of public documents, particularly where they are in another Federal District Court in the same [62] State, I should think you would have no objection, properly, to these, Mr. Dealy. Don't you understand the statute that way? I don't want to have any error in this record because we are overlooking something in that statute, but aren't these admissible under the public document statute of the Judicial Code?

Mr. DeLew: Certainly; certified copies.

Mr. Dealy: I would have to consult the statute on that to be absolutely sure, your Honor.

The Court: Suppose you do it during the lunch hour, and we will defer ruling on this until we give you an opportunity to do that. I should think these are admissible in evidence. Unless you can find something to the contrary, they will be received.

We will be at recess until two o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [63]

March 7, 1957—2:00 O'Clock P.M.

The Court: All right, gentlemen.

Mr. Dealy: Your Honor, we are resuming with regard to these documents.

The United States will at this time interpose no

objection to their introduction if the Court will permit us at a later time to obtain the record and examine it to see if there are other documents which we desire to put in.

The Court: Yes, of course.

They will be received with the understanding that the government may check them and call the Court's attention to anything that may be wrong, if there be anything wrong, which, of course, I have no notion there is.

Mr. DeLew: Thank you.

The Clerk: Defendants' Exhibit C in evidence.

The Court: Those are the bankruptcy proceedings. What are the numbers?

The Clerk: They are all in as one exhibit—C.

The Court: That's right, Exhibit C. Thank you. All right.

Now, is there any other evidence you want in the record before we proceed with the argument?

Mr. Jenks: As far as I know, your Honor, we are ready to proceed. Reserve any question regarding evidence on [64] attorneys' fees.

The Court: Oh, yes.

All right, you may proceed, gentlemen. Mr. Dealy?

Mr. Dealy: As your Honor knows from our opening statements this morning, I feel that you are familiar with the facts, so we won't belabor those at this time.

These taxes were assessed on the dates stipulated.

The Court: Well, there isn't any point in talking about that. Now, let's get right down to the

nub of this matter, and that is whether or not you have got a valid levy.

Mr. Dealy: Your Honor, the levy was served on the bank as the custodian of the funds. The bank in its pleadings, in the cross-complaint which they have filed, and in their answer to the complaint in the case of Leuschner versus the First Western Bank, the bank states, or has an allegation in its own complaint, and admits in the answer to the complaint, that a notice of levy was filed by the United States upon it. It states that, and it states that as its reason for being unable to distribute the funds or make payment out of the funds. And we feel that inasmuch as the levy was made in the normal course of business, it was made by the proper officer, it was made on a trust officer of the bank which held the property as custodian of the funds and as one of the co-trustees, as the co-trustee with actual custody of the property.

Now, under the law the levy is served on the individual [65] who has the property in its custody. That's what we have done here. We feel inasmuch as they have admitted that they received the notice of the levy and, I believe, the final demand, and the testimony of Mr. Hogan confirms that, that the matter is—of whether or not they had received it—is really not in issue, and that it was valid and in accord with the law, and that the United States, as to the action against the bank, is entitled to that penalty.

Now, even if the levy were said to be invalid by the Court as to the action against the bank, we

have valid liens on Richard D. Leuschner's property and all rights to property, and we are entitled in the other action to foreclose those liens against this property.

As your Honor is no doubt aware, these assessments were made and the liens arose under the section of the 1939 Code, Section 3670, which sets out the property which is subject to the lien. 3671 describe the period. This lien has not been released. This lien has been filed of record, and the court decisions hold that the tax lien is broad and comprehensive and covers all property possessed by the taxpayer to the extent of his interest in and any rights thereto. The decision on that is Metropolitan Life Insurance Company versus the United States, 107 Federal (2d), 311.

The Court: Well, now, what are the facts in that case?

Mr. Dealy: That case, your Honor, involved an insurance [66] levy on an insurance policy.

The Court: Is that a case where there was a spendthrift trust provision?

Mr. Dealy: No, your Honor, but I believe I can show——

The Court: Is that a case where the Referee in Bankruptcy had adjudicated the proceedings to which the government was a party, a creditor, that the assets were exempt?

Mr. Dealy: Your Honor, I believe I can show you right now on the spendthrift trust provision where the California law on spendthrift trust has no validity in this action whatsoever.

The Court: I would like to see that.

Mr. Dealy: All right, your Honor. It is a matter of Hornbrook law, as far as tax law is concerned, and the United States Supreme Court has so said, that tax litigation, tax law, is a matter of federal law, and that the state exemption statute which this spendthrift trust statute is,—

The Court: Oh, no, no. Is this spendthrift trust provision written into the trust instrument, or are you relying upon the statute?

Mr. DeLew: Written into the instrument, if your Honor please.

The Court: That isn't an exemption statute.

Mr. Dealy: Your Honor, a provision of an instrument of [67] this nature cannot exempt something from Federal taxation when the courts have all held, including this circuit, the Ninth Circuit and Tenth Circuit,—

The Court: Just show me a case.

Mr. Dealy: All right, your Honor.

The Court: I am kind of a case-reader. If you have a case that decides this one, why, let me read it.

Mr. Dealy: This appears—I will read this right out of the—

The Court: Let me see—let me read the opinion in the case that you think—

Mr. Dealy: Your Honor, I will have to get the opinions, because I didn't bring the opinions to court with me. I have the citations here, but I don't have the texts.

The Court: I always like to read them right

here. If you need one, why, send your associate up to the library.

Mr. Dealy: All right, I will have to go out and get him.

The Court: You don't need to get me a whole armful; bring me one that supports your position, either in the Ninth Circuit or in the Supreme Court of the United States. You mentioned both of those, Mr. Dealy. Let me have either one or both of them. We can stop the argument in a hurry if you have a case on that subject in this circuit.

Mr. Dealy: Your Honor, here is *United States versus Heffron*, in the Circuit Court of Appeals for the Ninth Circuit, [68] which states:

"Exemptions provided by State laws are ineffective against statutory liens of the United States."

The Court: Of course, that isn't this case. That's why I want to see these cases. I learned a long time ago the way to find out what a case decides is to get your eye on it.

Mr. Dealy: Your Honor, if I understand the argument of the plaintiffs, or the other parties in this case, they are relying on State statutes of this State which says you cannot exempt, that you cannot levy, or—yes, you cannot levy on a trust that has a provision in it of this nature. Now, what that simply means——

The Court: No. As I understand the argument in this case, it is founded upon the law of spendthrift trusts. Now, the law of spendthrift trusts, generally speaking, in this country, is that if a trust instrument contains a spendthrift trust provision

of a sort which I will describe in a minute, creditors of the beneficiary may neither reach the income nor the principal by way of anticipation. That is to say, it can't be reached by creditors until the installment, or whatever it is, is in the hands, paid into the hands of the beneficiary.

Now, that provision normally, in its widest scope, is that neither the principal nor the income payments can be [69] reached by creditors by way of anticipation of their payment.

Now, that's what they are relying upon.

There is some authority in the country with which I am familiar that a man, a beneficiary of such a trust, may not stand upon it to defeat his divorced wife's claim for support for herself and her children. As a matter of policy the courts have said that is the type of claim that isn't foreclosed by a spendthrift trust provision.

Now, I have been wondering, as I listened to you this morning, whether there is any authority that a Federal tax claim——

Mr. Dealy: We have that authority, your Honor.

The Court: Well, that's what I would like to get my eye on.

There is a line of authority with respect to alimony and support money—that is to say, this fellow can't sit over in the Union Club, you know, in a heavily upholstered leather chair with his feet on the window sill, basking in the glory of his opulence, while his wife and kids are starving out here and he has no other means out of which they can secure support money. Of course, the courts just

don't allow that. I think Justice Cardozo, when he was on the Court of Appeals, decided a case along that line.

Now, I don't know whether a Federal tax claim falls into a similar exemption from the application of a spendthrift trust [70] provisions, you see.

Do you gentlemen have any law on that? Now, there are some lines of cases with which I am generally familiar that are exempted from the application; the beneficiary is just not protected by a spendthrift provision in certain kinds of cases, and one is a divorce situation, support money, alimony and support money. A fellow can't be over there drawing \$1,200.00 a day, living in opulence, and stand on the spendthrift trust provision to prevent his former wife and half a dozen youngsters from having the necessities of life, bread in their mouths.

Now, I don't know. I have sort of a notion that maybe a Federal tax claim fell into one of those exceptional situations, and if it does, why, we can decide that one pretty fast. I would like to have Ninth Circuit decisions or a decision of the Supreme Court of the United States on this subject.

Mr. Dealy: Well, your Honor, our position on this whole thing is that this provision in the trust, in the agreement, is supported by a provision of the California statute.

The Court: Well, I don't understand that.

Mr. Troxel: May I make this suggestion to the Court, counsel? The California statute which was cited to the Court this morning is not an exemption statute; it is merely a codification of Justice Cor-

dozo's rule that a man is entitled only to his reasonable support from the spendthrift trust and [71] that the rest of it may be attached and taken by his creditors. It is not an exemption statute. Actually it is a derivation of the old spendthrift trust rule that the beneficiary should have it all and merely states that all that over and above that which is necessary for reasonable support may be taken by his creditors.

The Court: Now, I think that the exemption is founded upon the terms of the gift, I would say the creator of this trust, a gift to a beneficiary of a beneficial interest and puts some restrictions upon it. The California statute, it sounds to me, as though it is a limitation upon the creator's power to create the spendthrift trust in an unlimited sort of way.

Mr. Dealy: Your Honor, would you desire to adjourn this while I see where our authority is coming to?

The Court: No, while we are waiting for those, maybe we can talk about another one.

Another thing that bothers me is why isn't the Government bound by the adjudication of the bankruptcy court in this matter?

Mr. Dealy: Your Honor, the bankruptcy court acts under—I read that shortly before court convened, and as I read that, the bankruptcy court decided that Trust P-109 is a spendthrift trust and that the interest of the beneficiary bankrupt, Richard D. Leuschner, has in the trust is exempt from any claims of creditors. [72]

The Court: Yes.

Mr. Dealy: And of course all the referee could be deciding is in bankruptcy; he couldn't be deciding free from the claim of creditors in other proceedings.

The Court: Well, the trouble is the United States presented a claim.

Mr. Dealy: But the claim was not disallowed, your Honor, and the fact is that—in other words, the tax liability is still outstanding. The claim was not disallowed. In other words, the tax liability wasn't litigated in the bankruptcy proceedings.

The Court: What the trustee refused to do was to sequester this property and apply it to the payment of the claims that had been filed.

Mr. Dealy: That is correct, your Honor. Now, under Section 6 of the Bankruptcy Act, which is Section 24 of the United States Code, Title 11, it states exemptions of bankrupts, and that states as follows:

“This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for six months immediately preceding the filing of the petition * * *” and it goes on. But the important point here [73] is that the Bankruptcy Act specifically recognizes the exemption provided by state law, and it is our contention that the California law exempts spendthrift trusts, the bene-

ficiary's interest in a spendthrift trust, which the bankruptcy court recognized.

The Court: I don't think there is an exemption by statute at all.

Mr. Dealy: I don't believe, your Honor, I don't mean by statute, I mean either by common law or by statute. If the state law exempts it in any way, then the bankruptcy court is recognized, is granted the power by Congress to recognize that. But there is no such recognition granted in the Internal Revenue Code.

The Court: The bankruptcy court doesn't have to look for any exemptions by law, all the bankruptcy court has to do in a spendthrift trust provision is to see what limitations upon the levy the creator has written into that trust.

Mr. Dealy: Well, your Honor, our view of this case is that the bankruptcy court was empowered by the provisions of the Bankruptcy Act to act in that action with regard to a spendthrift trust as recognized by California law, and our view is that the Federal law states from the Supreme Court on down, including this Circuit, that exemptions provided by state law are not valid as to tax liens of the United States and that we are therefore justified and entirely entitled to [74] exercise the foreclosure of our tax lien against this interest.

The Court: I want to see whether or not those decisions go to a situation covered by a spendthrift trust provision and a trust document.

Mr. Troxel: If the Court please, I don't want to usurp the argument of counsel, but coming from

the office that prepared the trust indenture for the trustor, I feel a certain responsibility to uphold the validity of the spendthrift trust.

This is a document by which the interest, if any, of the taxpayer, Mr. Leuschner, is defined, and the interest created in him is created entirely by this contract. Anything that goes contrary to setting the contract aside is an abrogation of contract rights and contract likewise defining the amount of property also defined what any creditor, even the United States, if it does have a lien, establishes.

The Court: Well, that is to say the United States nor any other creditor can get more than the beneficiary of this trust had by virtue of the gift.

Mr. Troxel: That is correct, and since the cases have been decided under the provisions of Section 859 allowing creditors the surplus rights, a good many of the practitioners in California have gone one step further and specifically to provide in cases of divorced people or other creditors that the trustee shall pay to the beneficiary (A) only so much money as is reasonably necessary for his actual support, and that [75] the trustee will then pay the balance over to B, C, D, and E, which is a recognition of the fact you are creating only a certain limited interest in the beneficiary. [75-A]

We feel, as creators of the instrument here, that a valid limited interest is created which is subject to lien or taxes or anything else, and that it is not an exemption statute, it is not a law of exemption, it is a law of creation.

Mr. Dealy: Your Honor, here we have a decision

from the Court of Appeals in New York involving a spendthrift trust——

The Court: No, no.

Mr. Dealy: Your Honor, this is a case where certiorari was denied by the Supreme Court of the United States.

The Court: Where certiorari is denied, it doesn't mean a thing on the merits, Mr. Dealy, not a thing. The Supreme Court of the United States in the last year or two has half a dozen times been at great pains to say that all certiorari denied means certiorari is denied. It doesn't mean a thing on the merits.

Mr. Dealy: Your Honor, we have the United States vs. Canfield, Southern District of California, in this circuit, a case on this point, and my colleague didn't bring it down with him.

The Court: Well, all I have got to say to you, counsel, is that I am here for the purpose of hearing you on this point, and you better get your cases here, because I am going to decide this matter pretty soon and I would like to decide it on the basis of the authorities. But I am not going to have somebody summarize what they think a case held; I want to get [76] my eye on it. If you have any authorities, you better get them here.

Mr. Dealy: Until he comes, I guess I have nothing further to say.

The Court: Well, let's go over to the bank's side of the case. Now, counsel for the bank told me this morning—now wait, I want to talk to you about this, Mr. Dealy—the counsel for the bank

told me this morning that there was a controversy going on when that notice of levy——

Mr. Jenks: When the final demand was received.

The Court: When the final demand was made, there was a controversy going on because of the notice being served. That's No. 1. And before paying the money out, they are entitled to have that controversy settled. And moreover, the bank takes the position that they are only one of three trustees, that the ownership of this trust rests in the three of them and one couldn't properly respond to that notice and final demand, which had not been served upon the others.

Now, what do you say about that? This is the bank's argument. Of course, if we decide this thing the other way, I mean, on the point we were just discussing and that's why I wanted to discuss those first, you don't have to worry about the bank's position, but if this is a valid levy, valid liens to foreclose here, then we will have to examine these points, and while we are waiting for your authorities, we might as [77] well hear what your position is on that, Mr. Dealy.

Mr. Dealy: Well, as far as the position of the United States is on that, at the time the levy was made there was no controversy whatsoever, so the demand or the levy was made to pay over at that time. The bank didn't pay over. We made the levy on a trust officer of the bank, the bank has admitted that they received the levy from the trust officer.

The Court: Well, what do you say to the prop-

osition that in this very trust instrument, which the bank has a copy of, and as a matter of fact the bank is holding the trust under that instrument, in that instrument there is a spendthrift trust provision.

Now, the United States sends down a levy for a tax claim. The bank has presented right here and now a very serious question; it is the very question we are trying to settle in court this afternoon, namely, whether the United States can reach the beneficiary's interest in view of that provision.

Now, I think it would be very foolhardy, don't you, in view of that provision for the bank to turn the money over to the United States? Who is entitled to that money? Maybe the United States is; maybe the United States isn't. Now, do you think this court ought to impose a penalty upon the bank in view of these circumstances; (a) there is a spendthrift trust provision in this trust; (b) it's the United States claiming the full interest of the beneficiary under the trust, [78] principal and interest—principal and income, as a matter of fact; and (c) there are three trustees and some subordinate bank officer is the only one who has received any service about the thing. The other two trustees haven't been contacted at all, and there is a question about whether there is proper service upon the bank as trustee.

Mr. Dealy: I believe, your Honor, that they admitted here that the trustees were all contacted within a matter of hours or a couple of days and they had all——

The Court: Well, you're making a levy, now. You have got to do more than contact them.

Mr. Jenks: I might add a fourth point, your Honor, that there was nothing payable to the taxpayer the day the notice was received.

The Court: Yes. The fellow isn't entitled to receive his payment until the end of the month.

Mr. Dealy: Your Honor, we were actually seizing the right from that day on.

The Court: Yes, I know.

Mr. Dealy: All the other payments.

Mr. Jenks: The difficulty with that arrangement, Mr. Dealy, is your final demand does not ask for that. Your final demand merely asks for the amount of money owed on the date of the levy.

The further difficulty with that argument is, as I [79] pointed out this morning, the penalty statutes must be strictly construed, and it allows interest at six per cent from the date of the levy. Now, you can't allow interest at six per cent on sums that were not then payable. Therefore, under the penalty statute you must be referring only to amounts due on the date of the levy, and there were none.

Mr. Dealy: We contend that the six per cent, your Honor, runs from the date that the payments should have been made, whatever that might be.

Mr. Jenks: That is not what the statute says, your Honor, and it must be strictly construed.

Mr. Dealy: The lien, your Honor, applies to all property, rights to property, intangibles, everything else of Mr. Richard Leuschner.

Mr. Jenks: May I point this out, this is the first time the lien has been mentioned. I am perfectly willing to admit, your Honor, that whether this was a valid or invalid levy, when the bank received the notice, that gave the bank actual notice of the lien at that time. At that time we were not going to pay Leuschner, but merely because we had actual notice of the lien and therefore under the regulations, which exempt banks until they get actual notice, are not going to pay, does not mean that having received actual notice of the lien that we are under a duty to pay the Government and subject to a penalty if we fail to do it. As long as this lien is [80] in existence, whether it is foreclosure or not, we are not going to pay Mr. Leuschner because we have actual notice of it.

The Court: Of course, and you have a defense to his claim, but if you paid the Government and then the matter is litigated, if there is an issue being litigated, it would have been an improper payment and then you are liable to Mr. Richard Leuschner.

Mr. Jenks: You must remember Mr. Leuschner himself filed the first suit, the first information that they wanted to foreclose the lien.

The Court: Yes, Mr. Leuschner filed the suit against the bank.

Mr. Jenks: Against the bank and then we interpleaded the Government and that's the suit in which they want to foreclose the lien.

The Court: Now, to come back to my question, Mr. Dealy: In these circumstances, having regard

to, oh, four or five propositions that we have had presented by counsel, do you think a bank is subject to a penalty if it acts as it has acted in those circumstances?

Mr. Dealy: We contend, your Honor, that there is only one defense to that 3710 penalty: non-possession at the time of anything, and here they had possession of the trust, the rights of Mr. Leuschner.

The Court: I tell you what you are going to have to do [81] to get my concurrence in that view, you will have to show me some authority that is not just persuasive, you will have to show me some authority that obliges me to hold that way.

Mr. Dealy: Your Honor, it is because of this, as you know, I have not been able to research this problem that I wanted to file a brief in this case.

The Court: Mr. Dealy, I am in the habit of having counsel present a dozen cases to me during the trial term and I expect them to be ready in all of them. The United States Attorneys are expected to be prepared for the trial term in any case that comes on in the trial term.

Mr. Dealy: This is the case in United States vs. Canfield, your Honor, in the Southern District of California, which relates to spendthrift trusts.

The Court: Now, what do you say this holds?

Mr. Dealy: We say that that holds that the right of spendthrift trusts can be reached by the United States, the right of the beneficiary in the trust can be reached by the United States.

The Court: This is a Southern District case.

Mr. Dealy: That's right.

The Court: Now, did this go to the Circuit?

Mr. Dealy: To my knowledge it did not.

The Court: Well, let's see. This is Judge—Southern District of California and Judge McCormick. Have you folks [82] seen this?

Mr. DeLew: Yes, sir, Judge.

The Court: What do you say about it?

Mr. DeLew: Well, as far as the Canfield case is concerned, if your Honor please, I don't think it strikes this situation at all, for this very reason: that Canfield did not appear in the case, he didn't appear in the case to present his defenses, from what the case seems to indicate, at least. I have read it very thoroughly and I cannot find that he appeared there at all.

Number two, and perhaps more important, it does not in any place, in that Canfield case, bring out the proposition of Civil Code Section 859. In other words, the point wasn't even raised in that case with respect to the amounts necessary under this limitation of the trustor's power to create this limitation for the necessities of life that Leuschner is claiming here. It doesn't raise that issue at all.

The Court: Let me read this and see what it is about.

Mr. DeLew: Yes, your Honor.

The Court: Mr. Dealy, listen to this. The Court says on page 735, the second column, a little below the middle of the page:

“There is also respectable authority to the effect that issues of the legality of the assessments or the collection of the taxes of Canfield cannot be raised

by [83] the defendant bank, as it is not the taxpayer."

But here we have the taxpayer raising that question.

Mr. Dealy: To my knowledge the taxpayer hasn't raised the legality of the assessments here in this action.

The Court: That's what this whole claim is about.

Mr. Dealy: No, your Honor, to my knowledge the taxpayer admits the tax.

Mr. DeLew: We don't admit——

The Court: Legality of the assessment or collection, the enforcement of the assessment, that's covered by this language.

So far as the bank is concerned in the Canfield case, there is another distinguishing circumstance, and that is since 1927 the defendant trustee has yearly allocated and paid from the income of the trust estate of Canfield sums of money ranging from approximately \$51,000.00 in 1927 to more than \$35,000.00 in 1932. In other words, the bank paid out these moneys in spite of the levy, and in this case, the case before us, the bank is holding it. If you are talking about the bank's liability, that is a very different situation, it seems to me.

I don't see any place in this case where it says this is a spendthrift trust; was it in the Canfield case or not?

Mr. Dealy: Yes, your Honor, it was.

The Court: I don't find them saying so. [84]

Mr. Jenks: As I recall it, your Honor, this trust

had previously been the subject of a state court decision where a sister and creditor of this Mr. Canfield had sued and in the state court case, as a matter of case law in California, it was decided that creditors could reach the excess over and above what the beneficiary needed for his estate.

The Court: I see.

Mr. Jenks: In fact, as I recall it, the court decided Mr. Canfield was entitled to \$20,000.00 a year and the creditors were entitled to the excess.

The Court: I see. In other words, the statute referred to this morning was applied?

Mr. DeLew: Yes, the statute may have been codified, the decision in the case, I forget which came first.

The Court: I see.

Mr. Dealy: I believe it says it is a spendthrift trust on page 736, your Honor, the first paragraph, second column, on the second column.

The Court: The first full paragraph?

Mr. Dealy: The first full paragraph, starting with "We also find."

The Court: I have it now. Yes, I see it. Well, this is a very narrow point of time, it seems to me. This is a very interesting thing.

"In ascertaining the legal attendants to the [85] investiture of the property and rights to property of Canfield by the allocation of trust income to him, it should be noted that before giving money to Canfield, the trustee must necessarily decide to give it to him, and that during appreciable time, however brief, the allocation and award must precede

the delivery of the income Canfield is to receive, and during that time the lien of the sovereign taxing power attaches.”

That isn't what the spendthrift provision says; it says that the creditors can't reach it until it's paid into the beneficiary's hands, that's the usual provision.

Mr. Jenks: This even goes a little further, your Honor, and states that the trustees are entitled to the personal receipt of the beneficiary.

Mr. DeLew: If your Honor please——

The Court: Wait a minute, I am not through with it.

Well, as far as the bank's liability is concerned here, this case is distinguishable in view of this sentence:

“The true factual situation as we have found it from the evidence shows wilful falsification of existing material facts which misled the United States and which vitiates the alleged compromise averred in the pleadings in this action.”

Now, my goodness, there's no wilful falsification in this case.

Mr. Dealy: No, your Honor. [86]

The Court: Well, I don't believe that the case reaches us.

Now, you said something about having a United States Supreme Court case which holds that spendthrift trusts provision does not avail against the United States tax lien or claim.

Mr. Dealy: That was the Rosenberg case which

your Honor said you did not wish to consider, on which certiorari was denied.

The Court: You mean you had, you claimed you had a United States Supreme Court decision because——

Mr. Dealy: No, your Honor.

The Court: ——certiorari had been denied?

Mr. Dealy: No, that kind of a case——

The Court: Well, now, what do you mean, where is that case then? You said you had a case in which the Supreme Court of the United States held, as you told me.

Mr. Dealy: Your Honor, I didn't say that. My statement, as I believe it was, was that the Supreme Court of the United States has held that the exemption statutes of state law do not prohibit the United States from getting at the so-called exempt property for taxes. We have that in the case of——

The Court: No, I told you about Justice Cardoza's notion that the beneficiary of a spendthrift trust ought not to be able to live in opulence and prevent his divorced wife [87] and children from any livelihood out of that spendthrift trust estate, and I said that I have been thinking this morning that maybe there is a similar line of authority applicable to tax claims of the United States against such estates, and you said there was, and you said there was a Supreme Court decision.

Mr. Dealy: I believe, your Honor, I meant the Rosenberg case in which certiorari was denied. That to me—I am sorry if your Honor does not interpret it the same way, but to me that is the

same as having the Supreme Court make a decision on that point.

The Court: Mr. Dealy, it isn't a question of my feeling about it at all. The Supreme Court of the United States has said a dozen times in the last two years, they spelled that out, the various justices have filed memoranda where cert. is denied and Frankfurter, at great length said so. As a matter of fact, in the decision of Brom against the United States which involves petition for habeas corpus in a federal court by an inmate of a state penitentiary under a conviction and under sentence of death in a murder case. There are several associated cases there. In the Brom case Justice Frankfurter went to great pains to spell that out and impatiently spelled it out because it had enough of the subject, that when the court denies cert. they are settling some proposition of law on the merits and they denied it. The whole [88] court said so, and repeatedly.

Now, you talk about Hornbrook law, there isn't anything more plainly settled in the decisions of the Supreme Court of the United States than when you say that cert. denied holds something, or it holds, if you want to take the language of the court for it, is that cert. is denied.

Mr. Dealy: Your Honor, I have no Supreme Court case on the specific point of a spendthrift trust. The best I can do is Rosenberg.

The Court: You mentioned a Ninth Circuit case.

Mr. Dealy: All the cases I have, your Honor, Supreme Court, Ninth Circuit and Tenth Circuit,

all deal with the fact that a state exemption statute does not exempt from income taxes. That is the statement I thought I made.

The Court: Well, go ahead with your argument; now you have your authorities, I assume.

Mr. Dealy: Your Honor, I believe we have covered in various discussions here now the argument I had intended to make. I intended to stand on the line of decisions that says, from the Rosenberg will case on down, which is cited in the memorandum in the file, that spendthrift trust provisions are not exempt from income tax and that we can reach them to enforce our lien. And one of those decisions was the Canfield case. I believe I have decisions here, if your Honor desires to read them. [89]

The Court: The only trouble with the Canfield case is that under your California statute a man is entitled to have enough to support himself, protected by the spendthrift trust provision.

Now, he has testified here as to how much that is. Now, Canfield doesn't deprive him of that. You don't disagree, do you?

Mr. Dealy: I believe the Canfield decision, that decision states we can get to everything. I suppose in the state court the creditors can get to the extra.

Mr. Jenks: The state court said "excess".

Mr. Dealy: The state court said the excess. That decision stands.

The Court: Well, in view of the statute this decision is superceded.

Mr. Dealy: And, your Honor, I have decisions

which state that state exemption statutes, which we contend this state provision is an exemption statute, are not to stand in face of income tax litigation.

The Court: Let me see your best case on that.

Mr. Dealy: All right, your Honor.

Mr. Troxel: If your Honor please, I don't like to interrupt a point, but this is not an exemption statute.

The Court: I understand, but I just want to get my eye on a case and see what they are talking about. I understand [90] that. This is a spendthrift trust provision.

Mr. Dealy: Start off with a Ninth Circuit decision, your Honor.

The Court: You mean Hefron?

Mr. Dealy: Yes, your Honor.

The Court: Well, now, the Hefron case is talking about a homestead.

Mr. Dealy: That is correct, your Honor.

The Court: Yes. It is talking about a homestead which was selected by the owners of the property.

Mr. Dealy: That's right.

The Court: It isn't a situation where they acquire a limited interest in the property; they had all the interest in the property and chose the protection of the Homestead Law for this particular part of it.

Now, you say you have a Tenth Circuit case? What kind of a lien was it in that one?

Mr. Dealy: Federal income tax, your Honor.

The Court: I mean what kind of a state exemption. This is a homestead.

Mr. Dealy: I believe it is also another homestead.

The Court: Yes, I see it is. Now, what else have you?

Mr. Dealy: Well, I only have in this particular instance——

The Court: Have you a case now that holds that the [91] spendthrift provision is unavailable against a Federal tax claim, lien or otherwise? Have you got a case like that?

Mr. Dealy: We believe that is what the Rosenberg case in New York stands for. That is our best case on the point.

The Court: That's the Court of Appeals in New York.

Mr. Dealy: That's right.

The Court: You don't have any Federal cases?

Mr. Dealy: No, other than this Canfield case.

The Court: Well, I don't think Canfield reaches us. I don't think Canfield reaches us because California now says in the Code that he is protected up to the amount of support which he needs and the record is closed on that and the testimony is that he needs, what was it, \$750.00?

Mr. Delew: \$750.00, your Honor.

The Court: A month, which, in these days, it seems to me, is a modest enough sum for himself and his wife. His wife is ill, with prospects of being worse. Let me see that Rosenberg case you had here.

Mr. Dealy: Here are two decisions, the Rosenberg case and a Fifth Circuit decision.

The Court: Let me see the Rosenberg case. You say that is the best one you have?

Mr. Dealy: I believe that is our best situation.

The Court: That's a divided court; the Chief Justice and one other justice dissented. [92]

Does anybody have around here in one of the libraries in this building Scott's Treatise on Trusts, three or four-volume treatise on trusts? Do you know anything about that?

Mr. Dealy: I wouldn't know, your Honor.

The Court: Don't you have a central library?

Mr. DeLew: Just the Circuit Court Library, your Honor, on this floor.

The Court: If that's the case, I wonder if you would be good enough—I will give you a note to the librarian—to bring it in?

As a matter of fact, have you gentlemen examined the American Law Institute Restatement on Trusts on this subject?

Mr. DeLew: Yes, your Honor.

The Court: What did they say about it?

Mr. DeLew: This particular point, I don't think, is covered, as far as I recall.

The Court: I would be surprised if it didn't say something on that subject, in the notes or somewhere in there.

Mr. Jenks: I might say that as far as the bank is concerned, your Honor, we felt that this was a problem primarily for the taxpayer and we have not attempted to complete research. However, I know of no cases other than the Rosenberg case that could be construed as applying and I agree

with counsel that because of California law you may have an entirely different result involved in this matter. [93]

Mr. DeLew: Rosenberg, I don't believe, is in point here at all.

Mr. Dealy: I believe, your Honor, this case may be closer than any of the others, in the Maryland District Court, which discusses the Rosenberg case at length and applies it, notes the contrast, as I think we may have here.

The Court: New York has a statute like the California statute?

Mr. DeLew: If your Honor please, I think the statute involved in that case was strictly an exemption statute, a 10% and 90% type of thing where an arbitrary 10% went off to the creditors. I don't think that is the same type of thing. Now, I checked the Civil Practices Act of New York and I can tell your Honor it is an exempt statute, the Civil Practices Act in New York. I checked it.

The Court: Let's just see now what he says about spendthrift trusts. This is a Bible on the subject. The section is 157.4. Claims of the Government.

The section of the restatement is paragraph 157. This is 157.4, page 1121 of Volume 2, Scott on Trusts, second edition.

"In the Restatement of Trusts, paragraph 157, as originally adopted, there was no statement as to claims by the United States or a state against the beneficiary of a spendthrift trust. By an amendment adopted in [94] 1947, however, it was pro-

vided that 'Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary * * * by the United States or a state or subdivision thereof to satisfy a claim against the beneficiary.'

"Claims for taxes. It has been held in a number of cases that the Government can reach the interest of a beneficiary of a spendthrift trust to enforce its claim for unpaid taxes."

And he cites *United States vs. Dallas National Bank* in 152 Fed. 2d 582 in the Fifth Circuit, that is 1946, reversing 56 F. Sup. 701 in the Northern District of Texas, *Mercantile Trust Company vs. Hofferbert*, 58 Fed. Sup. 701, the District Court of Maryland in 1944, *United States vs. Mercantile Trust Company*, 62 Fed. Sup. 837 in 1945 in Maryland, in the Matter of Rosenberg, 269 N.Y. 247 in 1935.

"Thus in matter of Rosenberg it was held that the United States was entitled to a decree that the income to become due to the life beneficiary of a trust should be paid to it until its claim against the beneficiary for unpaid income taxes should be satisfied. Under the New York statutes ordinary creditors were entitled only to so much of the income as is not needed for the support of the beneficiary and to 10% of the income which is [95] payable to him. The Court held that these restrictions on the power of creditors to reach the interest of the beneficiary are not applicable to the Federal Government. The Federal statutes give the Government a lien upon

all property of the taxpayer for unpaid Federal income taxes, * * *''

You don't need to take this, Mr. Reporter.

(Court continuing to read.)

Mr. DeLew: If your Honor please, I am familiar with those pages that were referred to there, I have read them all forward and backwards and in not one have they got a statute like they have in California for the support. In not one.

The Court: Well, you're getting pretty close to Rosenberg.

Mr. DeLew: Yes, Judge, that's the strongest case the Government has got, they are getting close to it, but I will say, and I think the Court will recognize, that that was strictly an exemption statute. Now, a man could have been a millionaire and not needed any support and yet had his ten per cent only given to his creditors. Here we have a different situation. The law of this state says if a man is a millionaire he is not entitled to nothing, and the spendthrift trust goes out the window.

The Court: Let me put a question to you, counsel.

Mr. DeLew: Yes. [96]

The Court: Suppose it becomes established law in this country that the interest of the beneficiary of a spendthrift trust may not be reached for payment of income tax claims of the United States Government. Now, suppose in all the testamentary trusts of wealthy men in the nation from now on counsel writes that kind of a provision into it, the testamentary trust, or into a survivor's trust, for

that matter, or both, and of course the push will be in the direction by wills draftsmen and trusts draftsmen of doing just that. [97] Do you think that's proper law to establish that sons and daughters of the owners of the nation's wealth may have their income and principal removed from taxation simply because the old man had good tax counsel, when the instruments were drawn who wrote into the documents the spendthrift trust provisions?

Mr. DeLew: No, Judge.

The Court: No, of course you don't.

Mr. DeLew: Nobody is going to say that. But Judge, this is different, and it's our position and I think you recognize it, it's not simply the idea of a spendthrift trust. I would be the last man to say it, I am a taxpayer myself and a citizen and I hope to be a good citizen of this country, as all of us are, but when it come down to a man's support, when he is at the end of the line, when the State of California says these things, that's a little different, Judge. The sons and daughters aren't going to go broke, they are not going to go into bankruptcy to defeat the United States. I wish, like you do, that I had more income taxes to pay. He wishes he could pay taxes too, but now he is at the end of the line and all we are asking for here is support. He becomes a public charge, he has been through bankruptcy.

The Court: In posing that question to you I hope you didn't understand me as casting any aspersions upon folks in this lawsuit. [98]

Mr. DeLew: Of course not.

The Court: Or upon Counsel or the bank. I had no such thing in mind at all, but it just occurs to me, after reading Scott here, that's Scott's thinking.

Mr. DeLew: Yes, that's Scott's thinking in a brand of claim that we don't have here.

The Court: Scott's just writing in textbooks; we are going to make some law.

Mr. DeLew: Yes, Judge, but I think the best law can be written by keeping people off the charity rolls. Consider, Judge, this: consider the state of facts that we have. We have a tax claim in excess of \$200,000. Counsel figured out for us this morning the interest on that tax claim exceeds the income of this trust, the amount of receipts from that trust. The man gets a job. The collector throws a distraint on his employer. What's he going to do from here on out. If that man owes me \$200,000, or any sum, he can go through bankruptcy, clean the slate. That was the idea of our forefathers in founding this country, give him a chance. No, the Government says, we will give you no chance, and it's our Government.

That's not right, Judge. But it can be softened, it can be softened by at least letting him have his support money. There is nothing he can do to get rid of this tax claim. Absolutely nothing. He will never earn that much. He is fifty three years of age. How can he ever make it? It can't be done. [99]

I think the best law in this case is made by upholding the statute, the solemn statute of the State

of California. I honestly think so, Judge, with respect to this trust.

Now, perhaps your Honor does not wish me to go into the other points at this time.

The Court: Yes, please do.

Mr. Delew: All right. The other points that we mentioned this morning, first of all, is the attempted levy. There we have the fact that a certain notice of levy was served upon an employee of the bank, the trust department of the bank. The notice of levy was directed to the trust officer. The notice of levy itself is not a levy at all. I mentioned earlier today that it was struck down in another case, the case of the United States against O'Dell. It is reported in 160 Federal 304, and I am referring now to page 307.

In that case, Judge, there had been a stipulation entered into between the Counsel, much as we have done here, and in the stipulation, instead of attaching to it the notice of lien, they set out what it contained, and it contains the same language as this one does here that is before you.

Now, with respect to that notice of lien the Court has this to say.

"This paragraph" — which refers to the paragraph of the stipulation describing the notice of lien—"describes a mere statement or notice of claim. Nothing alleged to have [100] been done amounts to a levy, which requires that the property be brought into legal custody through seizure, actual or constructive, levy being 'an absolute appropriation in law of the property levied upon.'"

Then a whole flock of cases.

“Section 3692” — that is referring to the 1939 Code—“does not prescribe any procedure for accomplishing a levy upon a bank account. The method followed in the cases is that of issuing warrants of distraint, making the bank a party, and serving with the notice of levy copy of the warrants of distraint and notice of lien * * * no warrants of distraint were issued here.”

I was quoting from the book.

Actually no warrant of restraint was issued here, never alleged, never proved. No warrant of restraint here at all. That is only one case, and in the little memorandum I handed to you, Judge, there are more cases.

The Court: The provision of the Code which I just read you from Scott says they are liens.

Mr. DeLew: Yes, Judge, but that doesn't give rise to this case.

The Court: Well, it gives rise to the portion of this case concerning foreclosure.

Mr. DeLew: Judge, with respects to the foreclosure, may I point this out, that the pleading is his way: Leuschner, and it has always been bandied about here about suing the bank, [101] but they also sued Erida Reichart, who is one of the trustees. The bank wasn't sued alone by Leuschner, they were both sued as co-trustees. All right. Now, that's prayed for these funds, and so forth. Then the bank brought the Government in under the third party, under the cross-complaint in the state court. It was removed here and the only Govern-

ment pleading in that case, outside of a motion to dismiss, which was denied, the only Government pleading in that case was in answer to the bank's cross-complaint. Now, in order to bring a foreclosure against Leuschner they would have to bring an action against Leuschner and attempt to foreclose this. They can't bring that foreclosure merely by answering that bank's cross-complaint when they don't raise any cross-complaint of their own against Leuschner.

Now, I don't think that would be material here because I don't think their act is one to foreclose.

The Court: What do you say to that, Mr. Dealy?

Mr. DeLew: The actual foreclosure wasn't even mentioned.

The Court: Let's see what you have to say in answer to that.

Mr. Dealy: Your Honor, I was just going to dig out the pleadings on this.

The Court: Well, apparently you haven't proceeded against the taxpayer to foreclose.

Mr. Dealy: I believe we have, your Honor. I think I [102] will find it here in a minute.

The Court: All right.

Mr. DeLew: The taxpayer hasn't been proceeded against in any way by the United States.

Mr. Jenks: Maybe we could take a short recess while Counsel is looking through the pleadings.

The Court: Yes, we will do that.

(Short recess.)

Mr. Dealy: Your Honor, I have taken the liberty of laying out there part of the file which is the

answer of the Government to the cross-complaint, that is the third page and our prayer at the bottom. In that we pray for the foreclosure of tax liens against the interests. If your Honor desires, we could here and now make a motion.

The Court: Well, the Court doesn't desire anything, gentlemen, this is your lawsuit. You just asked me to decide some issues for you here and I'm here to decide them and the Court doesn't desire a thing at all.

Now, this is the Government's answer to the cross-complaint. In the first place, the complaint is filed by Leuschner against the bank.

Mr. Jenks: The bank and the other co-trustees.

The Court: And the other co-trustees.

Mr. Jenks: That is correct.

The Court: And the bank and the other co-trustees join [103] in this cross-complaint?

Mr. Jenks: No, the bank made the cross-complaint, strictly interpleader cross-complaint setting forth the fact that this was claimed both by the Government and by Mr. Leuschner, requesting that Mrs. Reichert and Mr. Leuschner both come in and assert any claim—Mrs. Reichert and the Government, and come in and assert any claim which they have, and the bank be permitted to deposit the money in court and be relieved of the liability. The deposit has not been made.

Mr. DeLew: Page two, top of the page, that is the Government's answer, your Honor:

"The United States of America by the undersigned, its attorneys, for its answer to the cross-

complaint of the First Western Bank and Trust Company,"

And then it goes on.

The Court: Yes, this is an answer to the cross-complaint and if this is a bill to foreclose the lien, why,—

Mr. Dealy: Your Honor, we will now move the Court to permit us to amend that to entitle it a complaint as far as the latter—a counterclaim, as far as the last page which sets out our liens, the assessment and prays for foreclosure.

Mr. DeLew: Well, I am going to object to that on the ground that it comes too late in this proceeding. If you have an action to foreclose, bring it later on. You can always bring an action to foreclose a lien. [104]

The Court: I don't believe, Mr. Dealy, that after the evidence is closed, after you have a stipulation of facts agreed upon and presented, after we have had upwards of three or four hours, three and a half hours of argument and about to submit the case, I don't believe then you can come in, by an informal motion and somehow amend an answer to the cross-complaint of the bank and turn that answer to a cross-complaint of the bank into a bill in equity to foreclose the Government's lien.

Mr. Dealy: Your Honor, we stated in our opening statement we proposed this as an action to foreclose the lien. We have asserted that from the very outset of this action.

The Court: The trouble is you haven't any pleadings on it.

Mr. Dealy: Yes, your Honor, we have this statement in here in which we specifically say that the interest of Richard Leuschner and the trust to the extent——

The Court: The trouble is there isn't any pleading against Mr. Leuschner. That isn't in any pleading against Mr. Leuschner.

Mr. Dealy: This, your Honor——

The Court: Other than in your answer to the cross-complaint of the bank.

Mr. Dealy: Your Honor, this is an answer to the cross-complaint filed by First Western Bank, and it reads First Western Bank versus Richard Leuschner, Erida Leuschner Reichert, and United States of America, and in our answer we set up as our [105] third separate and affirmative defense our right to foreclose our lien against the interests of Mr. Leuschner and have it applied to the extent of the interest to the lien.

The Court: Well, you gentlemen told me at the beginning of this matter this morning that you were ready. It would seem to me you aren't ready at all in this lawsuit, Mr. Dealy. I don't think the pleadings raise the issue of an attempt on the part of the Government to foreclose a lien against Mr. Leuschner at all. If you are going to foreclose a lien you have to file a proper bill for foreclosure, with all of our notice of pleading and our insistence in the rules upon substance and not form. If you think you have a right of action to foreclose a lien against Mr. Leuschner, it seems to me you must file

a pleading which names Mr. Leuschner as a defendant, you folks as the petitioners to foreclose.

I don't believe you have a petition to foreclose the lien here at all. All you have done is announce that your intention to do it, but are you doing it?

The motion is denied.

Let's proceed. We'll proceed with the matter on the present pleadings and dispose of it on that basis.

Mr. DeLew: Now, your Honor, so much for the notice of levy. I just want to call to your Honor's attention, your Honor probably already has it in mind, but just to complete the record, none of the other trustees were served even with [106] this so-called notice of levy which the Government claims is a lien.

Now, the last point we raise in this on our behalf—oh, and before I forget it, there is a line of cases that is headed by U. S. against Brechtel, 19 Federal 2nd 516. Unfortunately I didn't get that case, but that case makes the bald statement that a so-called notice of lien, as we have here, was served on one of the trustees of a school district and it had some designation on it other than the school district.

The court there held in a similar case what the Government's bringing against the bank, that the action would not be maintained, could not be maintained because where a notice was addressed to one other than the person who was charged with the duty of withholding the funds, then the persons who were charged with the duty of withholding the

funds did not need to pay attention whatsoever to that notice.

I just give you that for what it is worth to assist the bank in one of its positions, and there we are.

Now, with respect to the bankruptcy adjudication about which the storm reached this morning, it is, of course, the position of Mr. Leuschner here that this matter has been adjudicated there in the bankruptcy court. There the trustee in bankruptcy is representing all creditors, among which was the Government, which had a preferred claim and which was not subject to any exemption. In that case the trustee went after [107] this trust. It was denied.

Now, in the case of Maryland Casualty Company against the United States, a Federal Supplement case, 32 Federal Supplement 746, the facts are long and involved, your Honor, but I will just read, your Honor can examine it, but just read what the court said concerning this particular point.

“The judgment of the Referee in Bankruptcy stands in an altogether different light from the judgment on the bond. Under the statute and all the decisions, the judgment rendered by him was in effect the judgment of a court and entitled to the same credit and standing. The judgment was not only upon the merits but entered upon a claim presented in behalf of the United States by a party duly authorized to act for the defendant.”

This was a tax claim, too, an income tax claim.

“It may be, as contended by defendants, that it now appears that the decision of the Referee in

Bankruptcy was contrary to the actual facts in the case. But if so, there should have been an appearance for the collector or the defendant before the Referee when the claim was heard and evidence introduced in behalf of defendant, or at least an appeal taken from the decision. Neither the defendant nor any of its representatives did anything, although an opportunity [108] was given for a hearing and there was nothing to prevent an appeal. Under these circumstances, the decision becomes final.”

Now, that is exactly the situation here. The Government was in the case, the bankruptcy case. They had a claim before him, the matter of this trust was before the court. The trustee briefed it—I wanted to put the brief of the trustee in that case in evidence, which is antagonistic to our side, but Counsel objected, so it isn’t in. But there the whole issue was before the court. The Government simply did nothing. You can’t force them to act, and the Referee, for reasons of his own, based on what he considered to be the law, made his decision. Now, that decision, in my mind, is final.

Now, Mr. Dealy mentions about the exemptions of the United States—or the exemptions of the State of California affecting the bankruptcy proceedings, so forth and so on. But again I say it was not reached on that question, on the real question before the Court here and, as we discovered, the spendthrift trust, itself, this section 849 of the Civil Code, section 859 of the Civil Code, this support provision here, wasn’t an exemption statute at all.

It's a property right that must be respected by the United States. Very definitely so.

I think that's the position of the defendant Leuschner in this proceeding, if your Honor please, and I don't want to [109] take too much time of the Court, we are running a little late this afternoon, unfortunately, but I think there are other cases as well, I don't want to bring them before you, Judge, they all say the same thing. They are noted in my little memorandum. They all say the same thing and there's no use going into them and my reading them to you. They all go to the same point.

But I am honestly of the view that in a situation like we have here where we have got an adjudication in bankruptcy, where we have got defective notices of levy, where they weren't even served on the proper people, and the notice itself is no more than a notice. It is not a levy. The Internal Revenue points that up very well.

Actually under the Revenue Law a levy is not defined. We know it is recognized, to most of us, on the ground that the sheriff or marshal comes along and levies a writ of attachment or execution. It's a seizure.

Now, the levy is something that has to be levied. Now, as we grow up in the law and tax work—the gentlemen should know more about them than I do—these tax works and cases all go to the warrant of distraint. That's the thing that must be levied. That's what they are talking about when they are talking about a levy, and without the warrant of

distrain't you haven't got a levy. And the notice of levy means nothing.

Thank you, your Honor. [110]

Mr. Jenks: Your Honor please, I will be very brief. I will try to summarize the points.

We contend, as Mr. DeLew just did, that the notice is defective. Even if it is correct, it caught nothing. There was no money then due Leuschner from First Western Bank or from any of the trustees. It certainly could not catch any of the trust proper which, while some of it physically in the possession of the bank, only as one of the trustees and we all know that the trust property is owned by all trustees, even if by a state law or by agreement, two or less than all can act in accordance with it, the type of trust that is imposed in all trustees.

If they are seeking here, as they now contend, when they realized they didn't catch any money, that they have caught his right to future payments, again, he has no right to future payments from the bank, only from the three trustees. And again as I have said, they say we are dealing with a penal statute which must be strictly construed and my reading of it, particularly when it refers to interest at six percent from the date of the levy must be referring only to debts due or property held on the day of the levy and not to any after credits, and as I read to your Honor this morning, the notice of levy itself speaks in the present tense, and more important, the final demand, which says in the last printed paragraph, and I understand these documents are attached to the stipulation of facts: [111]

“Demand is again made for the amount set forth in the notice of levy, \$207,665.42, or for such lesser sum as you may have been indebted to the taxpayer at the time the notice of levy was served.”

Now, that is the demand, such lesser sums as you, trust officer of the bank, read it if you want, may have been indebted to the taxpayer at the time the notice of levy was served.

We are not indebted to the taxpayer in any sense in any amount on July 22 and it became indebted to him on July 31st for six hundred and some dollars.

But I think under the trust agreement, if he had died in the meantime it would not have gone to him, it would have gone to his children as successor life beneficiaries—life income beneficiaries.

It is my thinking in this case that judgment must be in favor of the bank on the so-called penalty action.

In the other action the bank's position is as set forth in our cross-complaint. We want to pay this money to the person entitled to it. If your Honor decides under the bankruptcy or under the terms of the California Law that Mr. Leuschner is entitled to sufficient money for his support, we want to follow the final order of this court; pay it to the Government, pay it to Mr. Leuschner. How we will work it out, if they pay it to the Government as to succeeding amounts, I don't know; maybe we'll have to do this from time to time. I think that [112] Mr. Troxel will agree basically with what I am saying, he might want to add a few remarks,

which brings me to the final thing which I have mentioned two or three times and that is attorney's fees. As I told you earlier, there are two theories, one that a stakeholder is entitled to fees out of the fund, and there is federal law to support it; one or two cases against it. We think the authorities in support are stronger. The other is the specific provision of the trust agreement itself that the trustees do not have to settle controversies, they may require legal determination and entitled to be reimbursed for their costs, for the attorney's fees. I feel that under that if I had been sending bills to the bank each month that we would be paid and entitled to be paid.

I am prepared to testify, if anybody wants me to, that we have a total of a hundred and forty hours of lawyer's time in this matter. Probably about seventy five or eighty of it is my time as our senior litigation partner; the balance is the time of Mr. Haynes, one of our junior partners.

Because the Government suggests that we are not entitled to any fees in the penalty action because they see this fee coming out of this \$15,000 that they hope to get—of course, if they don't get any part of the fifteen, they shouldn't care about the fee. I have tried to segregate it, but it is hard to segregate it when you are working on two such closely related cases. The most I can say that I could segregate the so-called [113] penalty action would be thirty three hours out of the one hundred and forty. We feel, if we were left free to do it, I would send the bank a bill for \$3500. I wouldn't

attempt to segregate it. It isn't strictly on an hourly basis. If you figure the whole one hundred and forty hours, it comes to \$25 an hour but it is not strictly on an hourly basis. If we take out thirty three hours that would leave a hundred and seven hours divided into \$3500, a little over \$30 an hour.

So that is my final comment in this. If your Honor will accept those statements, if Counsel will, all right, if you want me to go on I will do it. However, if Counsel says they will accept those statements——

The Court: Does anyone desire to have Counsel sworn and testify to the time and amounts and so on?

Mr. Dealy: No, your Honor, we will accept his statement as to the time.

Mr. Jenks: We have a bill for the bank here for incidentals that came along, like notary fees.

The Court: Well, as I understand it, Counsel, all Counsel concerned here have agreed that we need not have sworn testimony on the subject of attorney's fees.

Mr. Jenks: Thank you.

Mr. Troxel: If the Court please, the defendant Erida Leuschner Reichert is not interested in the penalty action at all. However, she is primarily interested in the state action [114] of Leuschner versus the First Western Bank, which was removed to the Federal Court and became action 35,416. In that action there is a prayer against the defendant for the payment to him of a sum equal to the amount of money that the trustees have held back, and we be-

lieve that in view of the facts and the law that my client, as a co-trustee, was justified in withholding payment, and accordingly we will ask for judgment in our defendant's favor in that particular action. I don't know whether you asked for judgment for that one or not in your statement.

Our office has not participated anywhere near to the extent that counsel for the bank has. I have gone over my files and records and I find that as of four o'clock I have approximately nineteen and three quarter hours of actual time spent, which I suggest could be rounded off at the usual figures of \$25 an hour for twenty hours, if that is agreeable, or if you wish I will also take the stand and testify as to the time I spent on motions, appearances, depositions, preparing pleadings, and research.

The Court: Well, I understand that Counsel has no objection on that.

Mr. Dealy: We will agree on the time, amount of time, your Honor.

The Court: Do I understand you to mean by that, Counsel, that you desire testimony as to the reasonableness of these fees? [115]

Mr. Dealy: We contend, your Honor, they aren't entitled to any fee.

The Court: That is something else again.

Mr. Dealy: It is up to the Court to set the fee.

The Court: Yes, I understand that, but the way you limited your consent, you say you don't require testimony as to the amount of time. What I want to know is are you now raising the question as to the reasonableness of the fees? In any way?

Mr. Dealy: We feel your Honor is competent to set the fee if any fee is allowed.

The Court: You don't require any testimony?

Mr. Dealy: We don't require any testimony on the reasonableness of the fee.

The Court: All right.

Mr. Dealy: But we will not agree on the fee.

The Court: I am not asking you to agree on it.

Mr. Troxel: Your Honor, we wish to be released from any and all liability for having concurred in not making payments to the beneficiary and we wish reimbursement for the trustee out of the trust proceeds in accordance with either the interpleader theory or the provisions of the trust agreement itself. Thank you.

The Court: Is there anything further?

Mr. Dealy: Your Honor, I only have a few concluding [116] remarks here.

The Court: It is past four o'clock. Is it going to be inconvenient for any of you to come in in the morning?

Mr. Dealy: Your Honor, I would like to return to Washington as soon as possible and I have about five or six other matters that have been held up by the trial this week and this case and they have to be done before I leave town. I was due back, I am due back in Washington on Monday morning.

The Court: You operate out of Washington?

Mr. Dealy: That is correct. Mr. Langley and I are from the Department in Washington.

The Court: I see. The Department of Justice?

Mr. Dealy: That's right.

The Court: Now, I had in mind if we got together tomorrow morning for a little while, I will give you overnight to dig up any cases, anything else you need to look up, that maybe we could arrive at a decision in this matter.

I don't think there is going to be any very probable purpose served by waiting on briefs in this case. I have a notion that if—may be wrong, and if that turns out to be wrong tomorrow, why, we won't decide it, of course. I will not decide the case until I feel competent that I know what the answer is, but we have a pretty clear picture now of what is going on here.

Mr. Dealy: If your Honor so desires, why, we will be [117] able to be back tomorrow morning.

The Court: You're here in town and if we lose you now it will be some time before you get back again and I'll be over in Salt Lake City, you know.

Mr. Dealy: That's right, your Honor.

The Court: And we ought to try to conclude this matter. I wouldn't mind coming over to San Francisco again, but I wouldn't feel justified in coming over to wind up some business that we ought to have wound up tomorrow, you know.

Mr. Dealy: All right, your Honor.

The Court: Is that agreeable with the rest of you?

Mr. Jenks: Yes, your Honor.

Mr. DeLew: Yes, your Honor.

The Court: Recess, then, until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken in

these proceedings until ten o'clock a.m. Friday, March 8, 1957.) [118]

Friday, March 8, 1957, 10:00 o'clock A.M.

The Clerk: United States of America vs. First Western Bank for further hearing.

Mr. Dealy: Ready.

Mr. Jenks: Ready.

Mr. Troxel: Ready.

Mr. DeLew: Ready.

Mr. Dealy: Your Honor, I have here one opinion which your Honor referred to, or was referred to in the Scott discussion yesterday.

The Court: What case is it?

Mr. Dealy: This is the Maryland decision.

The Court: It talks about spendthrift trusts?

Mr. Dealy: It does, and——

The Court: I don't think there is any question about that.

Mr. Dealy: This has an additional reference, your Honor, on our discussion of whether or not this spendthrift trust is recognized by state statutes.

The Court: I don't think that makes any difference in this case. I am prepared to rule on this spendthrift trust matter. We had that out yesterday and I am prepared to rule on that on the authority of the 1947 amendment to paragraph 157 of the American Law Institute Restatement on trusts and [121] on the authority of Scott, volume II, section 157.4. The provision of the restatement to which I refer says:

“Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be

reached in satisfaction of an enforceable claim against the beneficiary, by the United States or a state or a subdivision thereof, to satisfy a claim against the beneficiary.”

Now, that restatement, of course, as you all know, is the result of the labors of the best minds in the profession on this subject, both the bar and bench and the law school people, and moreover, it is supported by the cases that Scott refers to. So so far as the spendthrift trust is concerned, I think we should take that view of the matter.

Now, I should like to start this morning with the argument by Counsel for the taxpayer, and I should like to take points up point by point.

Now, I believe in your memorandum of points and authorities you start off with point one, a reference to the code. Now, let's get our eye on that code. That is Title 26, isn't it?

Mr. DeLew: Yes, Judge, I have it right here.

The Court: Now, let's put our eye right down on the language of that provision and see what it says and I think we can come to some conclusion about it this morning.

Mr. DeLew: Judge, may I read it? [122]

The Court: I prefer to put my own eye on it. My receptivity by ear is not as clear as it is by eye.

Which part do you wish me to read. That's 6332(B). Yes. All right. Penalty for violation. Now, this is the bank's position rather than——

Mr. DeLew: I think I meant the whole section there, A and B.

The Court: All right.

Mr. DeLew: Judge, in 6332(A) the argument runs this way: May I point it out? It reads any person in possession of property or right to property subject to levy upon——

The Court: You're not reading it all: "any person in possession (or obligated with respect to) property or rights of property subject to levy." Now, isn't the bank obligated with respect to that?

Mr. DeLew: No.

Mr. Jenks: Your Honor please, do you want the attorney for the bank or the attorney for the taxpayer to explain——

The Court: I don't want to discuss the bank's aspect of this case at this point.

Mr. Jenks: All right.

The Court: I would like to get the taxpayer's position clear, dispose of that. I think the rest is on a somewhat different basis. I am not sure the bank will be liable for any penalty no matter what happens to the taxpayer. So that [123] at this point I would like to see what is happening to the taxpayer.

Mr. DeLew: The argument is this, Judge: That code section provides that before the government's action can be brought, that is, the second government action against the bank, in which we are also a party——

The Court: That is to foreclose the lien.

Mr. DeLew: Well, both of the parties——

The Court: I don't believe you have got any foreclosure of a lien here. There isn't any action, nothing before us.

Mr. DeLew: No.

The Court: With respect to that I will come to that shortly.

Mr. DeLew: So then directing our attention to the first suit——

The Court: Yes.

Mr. DeLew: Now, before that action can be brought certain conditions must be met. There has to be a levy on the property. Now, the defendant must be in possession. Now the first question to be answered, was the bank in possession. The taxpayer says no, the bank is not in possession. Bear in mind, now, Judge, that what happened here was an attempt, or rather delivery of a so-called notice of levy on the bank alone directed to a trust officer. That's what happened here.

Now, the taxpayer says, no, the bank isn't in possession [124] the possession is that of the trustees. It's the taxpayer in this case, the bank, and his sister, Ida Reichert, the three trustees we have been talking about. The property is in the possession of those trustees. Now, it doesn't make any difference which pocket I put these keys in, it's all me. This trust is all the trust, and because the bank did this or that it still is the property of the trust. That section requires possession before levy can be made, even a good levy.

The Court: Well, if the bank didn't have possession, nobody did, because the bank was holding those securities and the bank was holding those monies. Now, of course, if the levy is upon the right, why, it is intangible and nobody has posses-

sion of that sort of thing. But the trust reads "securities."

Mr. DeLew: And real property.

The Court: Primarily, and that fig farm, a piece of real property. I don't know who actually was in possession of that, I don't believe there is any evidence on that, but so far as securities are concerned, that is the bulk of this estate.

Mr. DeLew: Yes.

The Court: The bank had those in its vaults, and moreover the bank had the money.

Mr. DeLew: Well, don't you agree, Judge, that possession of one of the trustees—let's assume this: let's assume [125] that there's a trust in my office and actually I am receiving dividend checks, although directed to the trustees, I put them in my bank and I pay out the funds. I am not a trustee at all, I am just the lawyer for it. Now, wouldn't my possession be the possession of the trustee? Would I be said to be in possession? I'm a mere clerk.

The Court: I think that's right, I think that a possession would be the possession of the trustees, but the government's got hold of one of the trustees.

Mr. DeLew: Yes, Judge, but by a notice of levy that is directed to only the trust officer in a bank, wasn't even directed to the bank.

The Court: Now, in your second point you say no effective levy has been made here against the defendant bank for any purpose, and you refer to some authority. Now, what's that all about? You refer to 6331.

Mr. Delew: Yes.

The Court: Now, 6331, subdivision A, says:

“If any person liable to pay any tax neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property * * * belonging to such person or on which there is a lien provided in this [126] chapter for the payment of such tax. Levy may be made upon” —Well, several things here.

Mr. DeLew: I think that’s important.

The Court: All right, I’ll read it.

“Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer * * *” I don’t see that has any application here. Let’s read it all first.

“If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the ten day period provided in this section.

“(b) Seizure and sale of property. The term ‘levy’ as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon

property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).” [127]

And then there is something about successive seizures.

Mr. DeLew: I don’t think that applies here.

The Court: All right, this is pretty broad. They say the term levy, when used in this title, includes the power of distraint and seizure by any means.

Mr. DeLew: Yes, that’s right.

The Court: Go ahead.

Mr. DeLew: Now, I call your attention to the reference to “notice of levy”.

The Court: Where is that?

Mr. DeLew: “Levy may be made upon the accrued salary or wages of any officer, employee, * * *” et cetera “by serving a notice of levy * * *”

The Court: “On the employer”.

Mr. DeLew: Judge, that is the only place in the entire Internal Revenue Code where a notice of levy is mentioned, and that’s the document that is served in this case, and it has no application to that type of thing. Now, that’s what they served here, a notice of levy.

The Court: Well, what do you think they should have done with the bank?

Mr. DeLew: If they were going to bring such an action, there is only one thing to do and that’s bring a warrant of distraint. That lays the groundwork, of course, for such a thing. [128]

The Court: I don’t think that they should be limited to distraint, because it is in the alternative.

It says, "the term levy as used in this title includes the power of distraint and seizure by any means."

I will tell you there is some analogies in the law of trusts about that. Suppose the beneficiary assigns his beneficial interest in somebody. Suppose, as a matter of fact, he assigns his beneficial interest to two or three somebodies successively. Successive assignments of the same interest by beneficiary. Of course, he has perpetrated a fraud.

Now, there is quite a body of law about that, and I believe it is the law that the first fellow who notifies the trustee of his assignment has a priority.

Now, there are two views, of course. There is the line of authority which says first in point of time, but there is another line of authority, and I believe it is the prevailing view, that the first assignee to notify the trustee has priority. And the courts place that upon the ground that by the notice to the trustee there is a sort of a seizure, that the trustee is holding the reins, this fellow comes and claims from the trustee and that's all he needs to do.

Now, what more is necessary, what more is necessary anyhow?

Mr. DeLew: He has three trustees.

The Court: What do you think the government should do? [129] What is a levy? Well, the Congress has defined what a levy is for this purpose; it's a distraint and seizure by any means—includes the power of distraint and seizure by any means. It isn't just the power of distraint, it is the power of seizure.

Mr. DeLew: Yes.

The Court: By any means. Now, one means that is familiar in trust law of asserting your claim of the trust property is to give the bank a notice.

Now, no prudent bank after such notice would turn the receipts or income over to the beneficiary. And the practice the bank followed in this case is not only the normal practice, but I imagine that it's never departed from. I can't imagine the bank, after having received this notice, turning over the income or the corpus to the beneficiary. Banks just don't operate that way. This, it seems to me, is a most effective way of taking hold of it.

What else do you do? You say a warrant of distraint. What would you do with a warrant of distraint that they didn't do with this notice. You get a warrant of distraint, you carry it down there and leave it with the trust officer. That's all you do.

Mr. DeLew: I would direct it to the trustee, certainly, direct it to the real parties. I might have left it with a bank, but I would also leave it with the other people as well. [130] I think that's the way to reach the situation.

The Court: What I am trying to straighten out this morning, I'm trying to take each segment of your argument and talk about each one separately, if we can. Now, if all you're talking about is this notice was served only upon the bank and not upon the other trustees, I understand that, we are going to take a look at that in a minute, but at this point I understand your argument is wider than that, you're objecting to this just being a notice.

Mr. DeLew: Yes, I have several cases.

The Court: We have our eye on that facet of your argument at this moment. Now, I have some difficulty seeing what else the United States is obligated to do in view of this provision.

Mr. DeLew: Well, may I call your attention to several cases, Judge?

The Court: I would be very glad to have you do so.

Mr. DeLew: The case of United States vs. O'Dell, 160 Federal 2nd 304. May I give it to you?

The Court: Yes.

Mr. DeLew: I think the second headnote covers it, United States against O'Dell, headnote number two.

I think at 308, the words beginning with "Sections 3692," which is now 6331 by reason of an amendment does not prescribe any procedure for accomplishing a levy. [131]

The Court: Now, let's see, what kind of a case is this? This is an action to collect from a trustee for the benefit of creditors of an insolvent corporation, certain unpaid excise taxes which had theretofore been assessed.

Well, the government failed to comply with the statutory requirements here to obtain a lien. This involves a construction of a different statute, it's section 3710.

Mr. DeLew: Well, 3710, I can't connect the 39 and the 54 code that quickly, Judge. You see, a lot of those sections——

The Court: Maybe the government can straighten us out.

Mr. Dealy: Your Honor, one major distinction between the 39 and 54 code is that in the 1939 code there was a provision for a document which is known as a warrant for distraint, but there is no such provision in the 1954 code. This section which Counsel has read and which you have read today refers to restraint or seizure, has reference to the situation where the collection officer actually goes out and physically seizes the property, such as, I'm sure your Honor is aware of the fact that we have actually seized movie actresses homes and put them up for sale, put up a sign and they are sold. That is distraint that is meant there. But in the 1939 code there was a document called warrant of distraint, but since this levy was made under the 54 code there is no such provision.

Your Honor, I would have to get the two sections and look at them because when they relabeled the sections, they relabeled [132] me out of business.

Mr. DeLew: May I say this, Judge, in deference to Counsel, at the same time the warrant of distraint comes to us from the common law, it doesn't come to us from in the Internal Revenue Bureau.

The Court: Yes, I know. The landlord went up to pick up the cattle of the tenant to pay the rent, that's how it started, and he actually picked up the cattle. Well, if you are limited to that sort of a thing, there's a lot of stuff that we have nowadays that you can't pick up like that.

Mr. DeLew: That's right.

The Court: This physical seizure idea doesn't follow through.

Mr. DeLew: That's what that case holds, Judge.

The Court: No, I don't think so.

Mr. DeLew: And here's another one that says the same thing. They all go the point where a notice of levy is a threat, it isn't a levy.

The Court: What does the notice say that was given to the bank, is that attached here to the stipulation?

Mr. DeLew: Yes, it is.

Mr. Dealy: Yes, your Honor.

The Court: Notice of levy. Oh, well, it's a form.

Mr. Dealy: Yes, your Honor, there is no form what you would call a levy form. Whenever a levy is made a notice of [133] the levy is served on them and that is, in fact, the levy.

The Court: Now, this form is pretty explicit. It says:

"Accordingly, you are further notified that all property, rights to property, monies, credits, and bank deposits now in your possession and belonging to the taxpayer (or with respect to which you are obligated) and all sums of money or other obligations owing from you to this taxpayer are hereby levied upon and seized * * *"

Mr. DeLew: Which is the same language used in the O'Dell case, Judge.

The Court: No, it isn't. This O'Dell case, the stipulation says, that gave written notice to the defendant that the tax assessments were unpaid, due and further notified—(reading to himself).

Yes, it does. I apologize to you. Seized and levied upon for the payment of said taxes.

Mr. DeLew: Judge, if I may say something further.

The Court: What do you say about this case? Are you familiar with this case?

Mr. Dealy: I'd have to read it over again, your Honor. I believe I have read it in the past, but I don't believe it has any application, your Honor, because one of the points in this case is that when the bank was sued by Mr. Leuschner the bank interpleaded the United States.

The Court: Yes. [134]

Mr. Dealy: And the United States—the interpleader was to the effect that we have this fund of money which is claimed and we want to know what the claims of the other people are, and you are required to state your claim.

The Court: Yes.

Mr. Dealy: Well, in its answer, the United States did state affirmatively that it had a claim to the money by virtue of the tax lien, and that under the lien it wanted the money paid to it. Now, the levy is a post lien operation, so to speak.

The Court: Yes.

Mr. Dealy: So in this case, your Honor, we have a valid tax lien and we have stated our claim to the money, which is before the Court. That is, in effect before the Court. I take it Counsel agrees, is that right?

We pleaded you wanted to pay it into it.

Mr. Jenks: Less attorneys' fees.

The Court: Well, we are going to work on that in a minute.

Mr. DeLew: I think Counsel goes to the matter of possession, we are going to the question of levy here.

The Court: In this O'Dell case the action isn't against the taxpayer, it is against the bank.

Mr. DeLew: Yes, as I recall——

The Court: That is, a levy against the trustee.

Mr. DeLew: Yes, as I recall.

The Court: The suit is against the trustee and this Court is confronted with the difficult situation of sticking the bank, or sticking the trustee and not sticking the taxpayer.

Now, you have the taxpayer here to defend and that's what I am talking to you about.

Mr. DeLew: Yes.

The Court: Now, the O'Dell case isn't in point.

Mr. DeLew: Well, I think it goes to the——

The Court: No, it doesn't. It's against the trustee or the bank. Now, what I want to know is, show me a case where they let the taxpayer out on this kind of a situation. That's what we are talking about now.

Mr. DeLew: Well, I thought we were addressing ourselves right now to the effect of the levy.

The Court: Well, yes, as to the taxpayer. You got a taxpayer here and the bank is holding his property and you have brought a suit against the bank to recover it, or part of it. Now, I am going to have to dispose of that suit here and we are talking about shall this judgment be for Leuschner against the bank, or shall this be a judgment for the bank, no cause of action in this case. Now, that's

the part of the case I would like to have you clear up a little bit for me. Now, the O'Dell case doesn't reach that. Have you any other [136] case that reaches it or where you got the taxpayer suing the bank where the government has noticed the bank that they have a tax lien and where a court lets the taxpayer recover against the bank because the bank held up the payments on account of the levy.

Mr. DeLew: Judge, I have researched this thing as well as anybody could possibly do——

The Court: I am sure you have.

Mr. DeLew: ——and I have not been able to turn up a case precisely on all fours with this one. What I have been trying to do, I have been trying to pull it together piece by piece on the basis of principle.

The Court: Well, we're looking at them.

Mr. DeLew: Now, as to the general subject, I was trying to address myself to what I thought the Court had in mind.

The Court: What I have in mind, I have already given you the analogy that I have in mind and on which I am disposing to deal with your levy question, as far as the taxpayer is concerned. Here the trustee, namely—let's take for the moment that the bank is trustee. Here is a trustee. He holds property in trust for a beneficiary, Mr. Leuschner. Now, the United States comes along and says we now have a claim against that property which is paramount to Leuschner's, turn the property over to us.

Now, the analogy on that is successive assignment of a [137] beneficial interest, really. I don't think

there's any question about it. The cases generally in this country hold the case of successive assignments, assignee who first gives notice to the trustee has priority.

Now, that is done upon the ground that's all you need to do to assert your claim against the trustees, all you need to do after that notice, the trustee is obligated to hold it for you.

Now, you may have an interpleader situation where the trustee isn't sure of what to do, he wants it litigated, as here.

Now, I think the United States, in view of the broad provision:

“The term ‘levy’ as used in this title includes the power of distraint and seizure by any means.”

I think that would include seizure by a notice of levy.

Mr. DeLew: Yes, seizure.

The Court: I am talking about seizure, by a notice of levy in the language of this form that the government has. It says:

“Are hereby levied upon and seized for satisfaction.” You mean they would have to go down to the vaults and pick up securities and put them in the pocket of the collector and walk off with them? Do you think that's necessary?

Mr. DeLew: No, but I do say it is necessary to have a [138] warrant of distraint. That is the time honored method of doing it.

The Court: Well, I am prepared to rule on that point right now. I think this levy here sufficient, as far as the taxpayer is concerned. I am not talking about the bank, I am talking about the taxpayer, between the taxpayer and the bank and the levy between the taxpayer and the government in their respective claims against the bank, I think this is a sufficient levy.

Now, let's get down to your next point, no levy has been attempted to be served on any of the other trustees. Here you have a point that only one trustee was served with this notice. Now, have you any authority on that subject?

Mr. DeLew: No, but I do have authority for the fact that where, as I mentioned at least to you yesterday, that there is one case that deals with the subject where a school district held certain funds and the notice was given to someone other than the district trustees. The court held that they didn't have to pay any attention to it. That was the case where there were three trustees of the school district and the notice of levy—I think it was a warrant of distraint—was given to someone other than the three trustees and did not name the three trustees, and it was held there they didn't have to pay attention to that. I didn't get the volume down, Judge.

The Court: Where was it decided?

Mr. DeLew: It is the United States against Brechtel, 90 Federal Second 516. The third head-note says:

“A notice of the levy of a federal tax on money

due a taxpayer from a county and notice and demand for surrender of such money to the collector of internal revenue were not binding on the county when addressed only to the chairman of the board of supervisors and not to the county.”

If your Honor is interested in looking at that.

The Court: No, I don't think it bears any relation to this. Where was it decided?

Mr. DeLew: The Eighth Circuit, Judge.

The Court: No, I don't think so. The Eighth Circuit is a very good circuit; it used to include the Tenth.

There ought to be, and I didn't take the trouble to research that myself, but there ought to be some analogies in the trust law about that where you have two or more trustees. May notices be validly served on one. Let's take a look for a minute.

Mr. Jenks: Your Honor, that is the same edition that we have and we don't find anything directly on it, but you might look at Section 194, or is that the 1956 edition?

The Court: Yes, this is 1954.

Mr. Jenks: We didn't find anything directly on it. In [140] fact, this section is merely authority that the co-trustees generally must act together, but we weren't able to find anything.

The Court: What is the paragraph?

Mr. Jenks: 194, your Honor.

The Court: Well, the rule is they can't delegate.

Mr. DeLew: That's true.

The Court: The rule is that they all have to concur.

Mr. DeLew: In our Section 863 is says:

“Except as hereinafter provided every express trust in real property, valid assets, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiary takes no estate or interest in the property, but may enforce the provisions of the trust.”

The Court: Well, let's see (reading).

Well, serving notices upon trustees, how about that? The trustees can authorize one of their number to exercise the power where the power is of such a character that there is no improper delegation. How about that? Is it improper delegation to let the bank hold these things in their vault, let the bank put the monies they collect in the account, is that an improper delegation, you imagine by the three trustees?

Mr. DeLew: Isn't it merely clerical?

The Court: Well it's more than that, it is a trust [141] committee reviewed the investments and made recommendations. As a matter of fact, the bank was running this trust.

Mr. DeLew: But they didn't exercise one of those recommendations until they had the consent of all.

The Court: I understand that. They didn't sell a security and they didn't buy a new one until they had the concurrence of all the trustees, of course. All we're talking about here is may you notify one trustee for all of them.

Mr. DeLew: And may you notify the trust offi-

cer of a—by serving an assistant trust officer of one of the trustees.

The Court: Well, I don't suppose you have to get to the whole board of directors.

Mr. DeLew: No, but I think you have to direct the notice to the bank.

The Court: I don't think you have to get the president of the bank.

Mr. DeLew: But don't you think it ought to be directed to the bank, Judge?

The Court: Well, let's see how this reads. It's directed to the trust officer, First Western Bank, San Francisco, account trust in which Richard D. Leuschner is partial beneficiary.

Oh, well, I don't think there is any problem about that, the trust officer. I wouldn't have done it that way, but I don't think there is anything fatal about it, being addressed to the trust officer. That isn't even a second or third rate [142] trust officer, it is the trust officer, and the trust officer is usually a vice president in charge of the trust department.

Mr. DeLew: I don't know.

The Court: Well, I can understand your interest in this thing. Let's see. There are several cases here, I hate to read all of them. I should think there ought to be something about notices. See if there is anything under notices.

Well, I don't see anything about it. I haven't made a very careful search, however.

Well, we will pass that one for the moment.

Now, your fourth one is property here sought is

not property subject to distraint. You mean because of the spendthrift trust provision?

Mr. DeLew: Well, no, Judge, but I think if you rule that the notice of levy in this case is sufficient, then that point goes out the window.

The Court: All right. Then the next one is number six.

Mr. DeLew: Yes.

The Court: That is Canfield that is spendthrift trust. That's a spendthrift trust you are talking about.

Mr. DeLew: Yes, Judge.

The Court: And so is six A.

Mr. DeLew: Now, before we pass that, I wish you wouldn't pass that so rapidly, Judge, it is very important.

The Court: Well, I don't know how you are going to get [143] around the provision of the restatement.

Mr. DeLew: Well, I think the restatement is quite all right, Judge, but consider this: it does not at all take into consideration the provisions of our code section 859.

The Court: Yes it does. You mean the support business?

Mr. DeLew: Yes.

The Court: Why, the restatement refers to it.

Mr. DeLew: Oh, I don't think so, Judge.

The Court: Yes, it does, it refers to support.

Mr. DeLew: I doubt that.

The Court: Let me read it to you again. I think it is perfectly explicit on that subject. It says:

“Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary by the United States.”

Mr. DeLew: Yes, but I don't think that applies to this type of thing.

The Court: What you're talking about is that the California Code provision turns the spendthrift trust into a trust of support.

Mr. DeLew: No, Judge. No. For example, consider this: Suppose I do an express trust, and I used the words for the support of my children. All right. Now, let's say for the moment that it provides such sums as \$2,000 a month for each [144] of my three children, and I used the words “for their support”. That would be the type of thing the restatement is talking about, or Scott on trusts is talking about.

Now, the California law provides that the idea of the spendthrift trust comes out of our Section 867 of the Civil Code of this state which provides for a spendthrift trust; but over and above it is the section to which I drew your attention, 859 there.

The Court: Well, Rosenberg answers that, the Court of Appeals in New York.

Mr. DeLew: It doesn't reach it, Judge.

The Court: Scott drew the 1947 amendment to the restatement with Rosenberg under his eye.

Mr. DeLew: I know, Judge, but looking at the Rosenberg case, it does not bear out that statement in there.

The Court: Well, New York had some similar provision.

Mr. DeLew: Judge, it wasn't raised in the Rosenberg case. The answer was obvious. Maybe the man had a thousand dollars coming in from other sources. We don't have that situation here. It just isn't covered in any of the cases. I have analyzed every case and I know, and I can tell you it isn't covered in any other case.

The Court: Well, all right. I will say this to you about the support. Uncle Sam isn't concerned in his collecting taxes about whether you have got enough money left to eat on or not. [145] Now, that's just as painful to me who is not a beneficiary of the spendthrift trust and to you who are not a beneficiary of the spendthrift trust as it is to Mr. Leuschner. The fact of the matter is the government has got to go on and in order to go on they have got to collect their taxes. We don't make any inquiry whether there is enough money left to support yourself.

Now, the whole purpose of paragraph 157 of the restatement, as amended in 1947, is to support that very policy, that the claim of the United States is paramount to any spendthrift or support provision of a trust, whether there is a state statute or not. As a matter of fact, the court in Rosenberg—I read this this morning—says that it is far from clear in New York that there is any policy of the entire state supporting a spendthrift trust against a tax claim of the United States. But if there were such a policy the policy of the state could not prevail

against a statute of the United States, the Internal Revenue Code and the income tax provisions. That's what Rosenberg is talking about. They use this language. I read it this morning.

Mr. DeLew: Yes, Judge, but that's purely an exemption statute, and I could go along with all these recitals from the textbooks to the effect that the exemption statutes may be stricken down by federal law but here we have a property right that is created by a person who is long since gone. [146]

The Court: Well, that's true of a spendthrift trust. That's this case. It bothered me for a while until I got my eye on the restatement, that the United States can't reach a greater interest in the trust than the beneficiary owns, but apparently the United States can. That's the American Law Institute restatement.

Mr. DeLew: I don't think it goes into this except in a general sense. It makes those statements but the cases that they base those remarks upon, they are not cases such as this.

The Court: But the restatement is broad enough to cover this one. I am going to stand on the restatement. I think I shall hold that 157, as amended in 1947, the American Law Institute restatement, applies here. The fact that there is a spendthrift trust will not avail the beneficiary, nor the bank, for that matter, standing alone.

The judgment in this case as between Leuschner and the United States on the original complaint will be for the United States. That is to say, my ruling specifically is it doesn't make any difference

whether there is a spendthrift trust involved because of section 157 of the restatement as amended in 1947.

Secondly, I think that the notice, which was addressed to the bank, notice of levy which was addressed to the bank, satisfies the statute, and particularly it satisfies that provision [147] of Section 6331(B) which says the term levy used in this title includes the power of distraint and seizure by any means.

Now, Congress has made that very broad and I feel strongly about that because there are analogies in the law of trusts of the sort. For example, the law of trusts to the effect that as between successive assignees of a beneficial interest that one prevails and has priority who first notifies the trustee. That's a sort of a seizure or taking possession of the beneficial interest.

Now, I think the statute is broad enough to enable the United States by a notice of the kind given the bank in this case to take that property.

Now, thirdly, I am prepared to rule that the service of the notice of levy upon the trust officer of the bank, which was one of the trustees, suffices in the circumstances of this case, where that bank held the assets, the bulk of the estate being securities which were in the vaults of the bank and money which was in the bank's commercial deposits. I believe that takes care of the thing.

Mr. DeLew: How about the bankruptcy, Judge?

The Court: Yes, I am prepared to rule on that. I think on that I would like to look at the brief you

didn't want to let in and I may let that in. Let me see that photostatic copy of the brief. We may get some help out of that. [148]

Mr. Dealy: All right, your Honor. We will have no objection to letting it in, your Honor.

The Court: Mark it as an exhibit before I read it.

Mr. Dealy: Anything that can be of help.

The Court: Well, I don't know if it is going to be helpful or not, but let's see what it says. I think it is receivable, I think it is admissible here on the basis that this will tend to show whether or not the issue was raised between the same parties down in the bankruptcy court. I think it's admissible on that basis and will be received.

The Clerk: Plaintiff's Exhibit D in evidence.

(The brief referred to was admitted into evidence as Plaintiff's Exhibit D.)

The Court: All right, I will read it. You don't need to take this down, Mr. Reporter. Any parts of it I read you don't need to take down.

(Reading by the Court.)

The Court: Well, I can see why the referee in bankruptcy turned this down. The thing you are up against here, I will let you argue it to me, but I suggest to you, Counsel, the thing you are up against here is you have a very different question in the bankruptcy proceeding than you have here. You have a construction of that provision of the Chandler Act which was in the prior bankruptcy laws, too, which answers the question what property passes to the trustee, and the answer [149] is

such property that the bankrupt could by any means have transferred before the petition or after the time of the petition, and I can well understand that the referee might and perhaps should hold in this case that the spendthrift trust provision being in that instrument the beneficiary was under an incapacity to transfer which prevents the property passing to a trustee in bankruptcy.

Then there is another consideration, too. That spendthrift trust provision is available to the beneficiary against creditors generally in this bankruptcy proceeding, it isn't available, the holding here against the United States, and it isn't available against his dependants and his divorced wife, and there are others, other exceptional cases, but the spendthrift trust provision is available against creditors generally. So, in a bankruptcy proceeding where the trustee is taking his interest for creditors generally, you have a different question.

Mr. DeLew: No, you don't Judge.

The Court: Why don't you?

Mr. DeLew: Let me point this up to you, if I may. The spendthrift provisions insofar as the general creditors are concerned are only available to the beneficiary to the extent of the amount necessary for his support. Any amount in excess of that—let's take an example.

The Court: You don't need to argue that again. We have [150] been through that several times. I understand the California Code. Under the California Code his creditors can reach anything that isn't necessary for his support. I understand that.

Mr. DeLew: By the same token, the referee couldn't reach that.

The Court: Yes, for the general creditors.

Mr. DeLew: Yes.

The Court: Beyond the necessities for support. But in this case we are taking that support away from him, too. That's the difference between the bankruptcy proceeding and this one.

Mr. DeLew: Yes, but in this proceeding, in the bankruptcy proceeding, the government had a priority claim. They already had a claim against him.

The Court: Yes, but the referee in bankruptcy was not deciding the issues we have here this morning.

Mr. DeLew: Well, the trustee is a representative of all the creditors, Judge, what can we think of that if a representative——

The Court: All he decided was that he wouldn't take this asset for the benefit of the creditors, all the creditors.

Mr. DeLew: Including the United States.

The Court: Well, he didn't take it for the United States, he didn't take it for anybody else. But that's like Cert. denies, he doesn't decide the question that is before him, namely, denied Cert., the Supreme Court says. All the referee was [151] saying is we won't take that asset, and the reason was that it didn't fall within the bankruptcy act and language that it was property which the trustee—which the bankrupt might by any means have transferred. That's what we are talking about here.

Now, I think I want to talk to the bank a little

bit this morning about that. I believe it would serve no useful purpose to pursue it further. With respect to your point that this matter has been settled by an adjudication in the Southern District of California by the referee in bankruptcy there, the Court takes the position that the referee's conclusions and decision down there were concerned with a different issue than is presented to us here. The issue there was whether this was property which Mr. Leuschner might by any means have transferred prior to the filing, or at the time of filing of the petition in bankruptcy.

So in the action pending here this morning between Leuschner, the plaintiff, against the United States of America, the defendant, the judgment will be for the United States, and will you prepare findings of fact and conclusions of law and the judgment in that matter.

Mr. Dealy: We will, your Honor.

The Court: Now, the United States has filed an answer and a counter claim — which is it, a cross complaint or a counter claim? [152]

Mr. Jenks: Cross-complaint, your Honor. This started as a State action.

The Court: I see. The United States has filed a cross-complaint against the bank.

Mr. Jenks: No, let's put it this way: The bank filed, interpleaded the United States.

The Court: That's right.

Mr. Jenks: And the United States answered that cross-complaint.

The Court: How did the bank get in here?

Mr. Jenks: Mr. Leuschner, the taxpayer, sued the bank.

The Court: That's right.

Mr. Jenks: And the other co-trustee.

The Court: I see.

Mr. Jenks: The bank, under the State interpleader statute then cross-complained against the United States and the other co-trustee.

The Court: I see. All right. Now, I want to talk to you about the bank's cross-complaint in this case.

Mr. Jenks: Well, the bank's cross-complaint is merely the usual interpleader pleading. I think it has already been held here by Judge Murphy, when he refused to dismiss it, that it was proper for the bank to cross-complain against the United States.

The Court: Yes. [153]

Mr. Jenks: Judge Murphy did that on the authority of a New York District Court case which was not taken to the Circuit Court, as far as I know, and I think Government counsel will agree with me, this question has not been decided by any circuit court.

The Government counsel feels when the stakeholder is sued, as the bank was, that the United States has not consented to be sued. However, as I said, the circuits have not yet spoken. Judge Murphy here, by denying the Government's Motion to Dismiss has said yes, that this statute—I forget whether it is 2310 or 2410.

Mr. Dealy: 2410.

Mr. Jenks: 2410 covers that situation.

The Court: So that already has been decided.

Mr. Jenks: Judge Murphy refused to dismiss the cross-complaint.

The Court: I see. Well, I won't have to review that. Now, the Government claims that the bank is liable.

Mr. Jenks: That is correct.

The Court: That's what I want to talk to you about. I think I'll let the Government bear the burden on this, because my impressions at this point are that the bank ought not to be liable for any penalty in a case like this.

Mr. Jenks: In that connection, your Honor, I might make one observation before the Government replies. We also feel that the notice of levy was defective. However, for our purpose, except the penalty, that is immaterial. The notice of levy, even if defective as a seizure gave the bank actual notice of lien, even if it didn't seize anything, and once the bank got notice of the lien, the bank couldn't pay except at its peril.

The Court: That's right.

Mr. Dealy: Your Honor, our view on this penalty action is simply this: that under Sections 6332(a) and (b) of the 1954 Code, which your Honor was reading this morning, Congress took a, perhaps you might call it, a funnel view.

The Court: A what?

Mr. Dealy: A funnel view, that here you have a number of people with interest in a particular sum of money or a particular bit of property and rather than have to run all over the lot gathering in the

thing, they gave the District Director, the Commissioner of the Internal Revenue Service, this right to come down to the end of the funnel to the person in possession of, or the obligation with respect to property or rights to property, subject to levy. In other words, it got down to that last person, and in most of our cases it is either the bank or an insurance company. The idea was that that last individual, a levy can be made on them and we, by that means, can seize the property as it comes through the funnel and we've got payment. [155]

The Court: What you are asking me to do is to give you a judgment against the bank in the amount of the value of the property and assets which it has failed to turn over to the United States up to this time.

Now, you're talking about a case involving some nice questions of law, as we have discussed them here, where the bank was confronted with those questions in the law suit by Leuschner against the bank, with the United States on the one hand and Leuschner on the other and the bank in the middle.

Now, whatever it does, it is going to be acting at its peril after your notice. It's sued by Leuschner, the beneficiary of the trust, and it has been noticed by the United States Treasury Department, so whatever it does it is going to be acting at its peril.

Now, do you think Congress meant that in a situation where there is a genuine doubt about the United States' right to take this property as against Leuschner, do you think that where there is that genuine doubt and where the bank is acting in good

faith and where if it acts one way or the other it's acting at its peril, do you think that the Congress of the United States meant that the United States District Court should forthwith give you a judgment or a penalty in the amount of the whole amount of the trust property?

Mr. Dealy: Well, admittedly, if your Honor please, in this case we have a more difficult situation insofar as [156] the action of Mr. Leuschner was filed before our action was filed?

The Court: Right.

Mr. Dealy: So admittedly we have a more difficult situation. But we feel that there are decisions which hold, we have them cited here in our memorandum in the file, that the defendant, the bank, faced no double liability for compliance with the levy even though other parties may have claimed the fund. This language is from *United States vs. Hewland*, a Fourth Circuit case, which says as follows: "Payments to the Government pursuant to the levy and notice is a complete defense of the debtor against any action brought against him on account of the debts."

The Court: No, nothing like that in this case. Leuschner has already sued the bank. Leuschner has sued the bank and he says, "Turn over my property to me," and then you fellows levy on it.

Mr. Jenks: The levy was prior to the suit, your Honor.

The Court: Yes. The final demand was subsequent to it.

Mr. Jenks: Yes.

The Court: Now, Leuschner says, "I am a beneficiary of the spendthrift trust. You fellows can't take this interest for that claim."

Mr. Dealy: Your Honor, in response to that we have here [157] a statement in our memorandum that the fact that the property due the taxpayer may be the proceeds of a spendthrift trust does not in any way prevent the seizure thereof of the United States, and we cite Rosenberg and the other decisions.

The Court: Of course, I am going along with that finally, but the bank was confronted with this litigation to find out what the answer was. How is the bank going to know what the answer is in California, in the Ninth Circuit, finally maybe before the Supreme Court of the United States.

Mr. Dealy: Admittedly we haven't got any Supreme Court cases on that; we have only the Southern District case in California.

The Court: Well, you have another one this morning, right here, as far as the taxpayer is concerned.

But what we are talking about is a very different thing. Here's a stakeholder, the bank. It has no interest which way this litigation goes. I don't care whether Leuschner wins or whether you win. But here's the predicament they are in. Leuschner is suing them for his money and you've levied on it, on the tax claim due by Leuschner and how's the bank going to turn that over to you without running the hazard that some court's going to say, "Well, this American Law Institute, paragraph

157, doesn't apply here in California in view of the statute about support, one thing and another. It seems to me that the bank is placed in a most hazardous [158] position. These problems are not without difficulty. Now, it's not open and shut.

Mr. Dealy: We have had some difficulty over this one ourselves.

The Court: Yes, of course. Well, do you think that Congress meant—I am talking about Congressional intent now—do you think that Congress meant, when they enacted Section 6332 of Title 26, do you think Congress meant that a bank should be subjected to penalty, the full amount of the value of the assets it fails to turn over to the Government in a situation like this?

Mr. Dealy: Of course, your Honor recognizes the fact that we are not seeking a double payment by any means. We [159] are only seeking one payment.

The Court: Yes, but suppose you can't get it out of Leuschner. I give you judgment against Leuschner, I have already done that this morning.

Mr. Dealy: Yes, your Honor.

The Court: All right, you can't get blood out of a turnip. I don't know what his situation is. So you can't satisfy that claim out of Leuschner. What you want to do is satisfy it out of the bank.

Mr. Dealy: First we want to satisfy it out of the assets.

The Court: I suggest to you I don't believe Congress meant that the bank should be allowed 100 per cent. Now, [159] what have you lost by reason of

the bank's action? The bank hasn't turned a dime over to Leuschner. You haven't lost a dime. The money and property is still down there. Now, you have some remedies; you can forego that lien. I'm going to hold something presently about that. I don't think you are doing it here.

Mr. Dealy: Is your Honor giving us a judgment? Is it my understanding we are getting a judgment for the amount now held by the bank which Mr. Leuschner sued to recover?

Mr. Jenks: I didn't understand the United States was getting any judgment in either case.

The Court: Well, what I am doing is holding that Leuschner fails in his action against the United States.

Mr. Jenks: Against the bank.

The Court: I mean against the bank.

Mr. Jenks: Which the United States has cross-complained, is a cross-defendant.

The Court: Yes. Leuschner fails in his action against the bank, and will you prepare findings? You should prepare those. I asked you to, counsel, but I was mistaken. The bank should prepare findings and conclusions and the judgment in that matter, in the Leuschner-bank litigation.

Mr. Troxel: And is the Court also holding that Leuschner fails in his action against the individual trustee?

Mr. Jenks: Well, she is also a defendant. [160]

The Court: Certainly. You represent the individual trustee?

Mr. Troxel: Yes.

The Court: Well, will you cooperate in the preparation of those findings and conclusions and judgment?

Now, then, so far as the Government's alleged suit to foreclose the lien is concerned, it didn't perform it, hasn't any pleadings.

Mr. Dealy: Your Honor, you have in the interpleader action when we were brought into the action, and it was asked that we state our claim, we did request the Court in that answer, as an affirmative defense, to direct the bank to pay over the fund which they say they can't determine who to pay it over to. As a result of our levy we asked that they be directed to pay that over to us. Now, insofar as you have held that the levy is valid between Mr. Leuschner and the United States——

Mr. Jenks: Counsel, I think the trouble with that is it raises a question I don't think is actually at issue here. On the date of the levy there was nothing payable to Leuschner. On the date that the bank filed its cross-complaint bringing the Government in, there was a certain sum payable.

The Court: I'm not talking about that, I am going to take your argument up point by point with respect to that. Maybe that's what we should do first before we talk about [161] what the Government's going to come up here with.

So far as the bank is concerned, I am going to take the position that it is not liable to the Government under this penalty provision for anything, and I'm doing that on the basis that there was no money then due at the time of this levy. And I'm

doing it on the basis of the proposition that a fellow had to live to the end of the month to have anything due him. There wasn't anything then due at the time of this levy, wasn't anything owing and the bank owed no obligation to pay it.

But even if there were something then due, I take the position that the Congressional intent does not go so far as to impose this penalty upon the bank under the circumstances of this case where there are genuine and real and serious issues of law as to whether the bank should pay the money to Leuschner, the beneficiary, or the United States, the tax claimant. Now, I believe that's enough. You had some other points.

Mr. Jenks: I think that means I will prepare the findings and conclusions of law and judgment in that matter also.

The Court: I think you should.

Mr. Jenks: And then we will come back to our little tail end of attorneys' fees and costs.

The Court: Yes, I am going to allow you the attorneys' [162] fees as you claim.

Mr. Jenks: That would be \$3,500.00 for the bank, and I believe yours was \$500.00, wasn't it?

The Court: I think that's modest enough.

Mr. Jenks: Thank you.

The Court: In a matter of this kind.

Now, so far as the United States is concerned, I suppose that takes care of everything.

Mr. Dealy: Well, your Honor, we still have in the action the claim in this answer to get the funds. I believe that that request to get the funds which

the bank admits that it holds and wishes to pay over to somebody, that we are entitled to receive the funds.

The Court: Whether the levy was good or not.

Mr. Dealy: Well, your Honor, I believe, has held today that the levy was a good levy.

The Court: Well, it's a good levy.

Mr. Dealy: The thing I am trying to get at, does your Honor desire that we go down with another levy now?

Mr. Jenks: As I understand it, Mr. Dealy, see if I am wrong about it, your Honor held that these funds are subject to the Government's lien, that however your right to obtain them today has not been properly pleaded. You cannot foreclose your lien. So as I see it, what you will do, after the judgment and conclusions are filed here, and assuming [163] there is no appeal that prevents it, you will then bring an action to foreclose the lien on such sums of money which the bank is then holding. Once you give us notice of that levy we aren't paying——

Mr. Dealy: Well, I think I can serve the levy again immediately.

The Court: Well, I am not intimating any suggestion about that.

Mr. Dealy: But your Honor, I believe we do have in the pleadings all the essentials for the foreclosure of the lien. We have pleaded the lien and we have pleaded everything else.

The Court: Now, I examined that, I looked at

your pleadings yesterday. I don't believe you have an action here to foreclose the lien.

Mr. Dealy: All right.

The Court: I am going to take that position, that it isn't pleaded, you come in the back door, even with our notice pleading; you must at least have a document that purports to proceed against Leuschner here. Your answer was simply a response to the bank's counter-claim—cross-complaint.

Now, is there anything about which anyone is unsure? You folks prepare the findings and conclusions in question.

Mr. Jenks: Yes, your Honor.

The Court: How much time do you want to do that? [164]

Mr. Jenks: I think one problem is submitting them to Mr. Dealy ahead of time, not knowing—maybe he doesn't know where he is going to be. I think I could have them ready to give to opposing counsel Tuesday night anyway, or Wednesday.

Mr. Dealy: I think, your Honor, in view of my impending travel status at the moment, I think we had better have the findings of fact and conclusions of law submitted to the United States Attorney's office here.

Mr. Jenks: Yes, to Mr. Gillard.

Mr. Dealy: And then I believe Mr. Munter and Mr. Gillard will go over them rather than try to catch up with me.

Mr. Jenks: You will be here all of next week, your Honor?

The Court: I will be here all month. [165]

SETTLEMENT OF FINDINGS

March 28, 1957, 10:00 o'clock a.m.

The Clerk: Leuschner vs. The First Western Bank and Trust Company; United States vs. First Western Bank and Trust Company, settlement of findings.

Mr. Jenks: Ready, your Honor. Mr. Troxel, who represents the sister and other trustees, Mrs. Reichert, I believe informed the Court he had a previous engagement in the State court which he couldn't postpone and which prevented him from being here at ten. He stated to me and I believe to the Court that he will abide by any decisions of which the bank counsel makes.

The Court: Well, what I have to discuss with you doesn't concern him too much.

I seem to recall that in your opening statement, counsel, you're counsel for the First Western Bank.

Mr. Jenks: That is right.

The Court: You said this is an interpleader proceeding and ready to tender the money into court and abide by the results. Now, if that's the case, and I thought we'd examine the pleadings here together this morning, if that were necessary, for the purpose of determining precisely what is the situation.

Now, the thing I had in mind is this: If I sign the findings and conclusions and judgments as you have prepared them, the United States is going to be proceeding against you to get that money, and we'll have another proceeding here. I [168] would

like to settle this all up in one proceeding, so we don't have two proceedings.

If this is properly to be regarded as a bill of interpleader, that is to say, if your pleading is to be regarded as a bill of interpleader, then I think we ought to treat it that way in the findings and conclusions and judgment; that is to say, I think the United States should have its judgment against you for the money in this proceeding.

I am perfectly clear that Leuschner cannot recover against the First Western Bank, and I am perfectly clear that the United States cannot recover against the First Western Bank for the penalty under the statute, and those matters are decided. I am not having you here this morning for the purpose of reviewing those rulings at all. I think we are here to discuss and to clear up for me the interpleader matter. That's what I had in mind.

Mr. Jenks: All right, your Honor. The State court action brought by Mr. Leuschner, and under the State court rules and Federal decisions, as we understand them, permitted us to file a cross-complaint in interpleader, which we did do. That is in the original State court action, Leuschner vs. The First Western.

In that cross-complaint we offered to tender, and as I stated to you, we are still willing to. It seems to me that when your Honor rendered your decision that Leuschner was as plaintiff in the State court was not entitled, that the [169] interpleader fell with that decision, particularly when your Honor said—you will recall the Government's an-

swer to the bank's cross-complaint, had a prayer for foreclosure, and Your Honor ruled inasmuch as that was only an answer to our cross-complaint and not an affirmative pleading to foreclose, that they could not, in that interpleader action, foreclose the lien.

Now, I have been assuming that the United States would come in with one of two things; a new notice of levy, which will catch whatever funds we then have, less the attorney's fees, plus whatever funds might become payable prior to the notice of levy.

The Court: There isn't any sense in requiring the United States to go through any more proceedings.

Mr. Jenks: There is one other gesture, your Honor, I think they will have to go through, if I understand their theory. They claim that they have a right not only to money as it becomes due, but a present right to Leuschner's future beneficial interest.

Now, it seems to me that the only way they could do that is by foreclosing their lien.

The Court: What money did you offer to tender into court?

Mr. Jenks: I offered to tender into court the money which we—as it became due.

The Court: The installments of the income.

Mr. Jenks: That is right, less the attorney's fees and [170] expenses of the trust.

The Court: Yes. What do you say about this, counsel?

Mr. Munter: Your Honor,—

The Court: I haven't heard anything from the United States Attorney. I developed this idea on my own motion.

Mr. Munter: We were brought into the original action under Section 2410 of Title 28, which is the only way that jurisdiction could be obtained over the United States.

The Court: What section is that?

Mr. Munter: Section 2410 of Title 28.

The Court: I know, but tell me what it is.

Mr. Munter: It provides for an action to quiet title or for the foreclosure of a mortgage.

The Court: Yes.

Mr. Munter: Where the United States claims a lien on the property. It provided in that section that in any case where the debt owing the United States is due, the United States may ask by way of affirmative relief for the foreclosure of its own lien.

The Court: The trouble is you didn't do it.

Mr. Munter: We didn't file a separate affirmative pleading, but we did ask by way of affirmative relief to realize the money on our liens. We didn't use the word—

The Court: Why don't you get your pleadings and read to me what you did. Let's get our eye on it.

What's your whole pleading, now? This is an answer, really, [171] isn't it?

Mr. Munter: This is the answer to the cross-complaint filed by the First Western Bank and

Trust Company, which was a cross-complaint in interpleader.

The Court: Yes. All right. Now, read that answer to me. How long is it?

Mr. Munter: Well, it's three and a quarter pages.

The Court: Well, read it to me. Let's see what it says. That is to say, you can leave out the formal things.

Mr. Munter: We have admitted various allegations here.

The Court: You have some admissions and you have some denials; right?

Mr. Munter: Right. As a third separate and affirmative defense we pleaded that all right, title and interest of Richard D. Leuschner in and to any property of any sort, including any trust or any proceeds thereof, is subject to the tax liens of the United States based upon assessments duly made for the income taxes for the years 1943, 1944, 1945 and 1947, as follows: —then we set out each assessment with the date the assessment list was received, and the amount. The amount is approximately \$200,000.

We then alleged the amounts, although duly demanded are unpaid. We then set forth notices of tax liens were duly filed in San Francisco County on June 23, 1952, covering the first three years referred to above, and on September 19, 1952, [172] covering the last year referred to above, and in Merced County, California, on July 21, 1952, cover-

ing the first three years, and on September 24, 1952, covering the last year.

Then our prayer is as follows: Wherefore the defendant prays; 1, that the complaint herein be dismissed; 2, in the alternative, in the event it is determined that the court has jurisdiction, that all moneys or other property of Richard D. Leuschner from the trust herein or held by or in the control of any other party, be ordered paid over to the United States of America pursuant to the tax liens.

3, that the interest of Richard D. Leuschner in the trust herein to the extent of the tax liens be declared to be payable to the United States of America and that the trustees of the trust herein be ordered to pay all payments and distributions under the trust as would have gone to Richard D. Leuschner to the United States of America until the amounts outstanding on of its means are fully paid, and for such other relief as may be proper.

Thus we affirmatively pleaded our liens and we asked that the money be paid to us under those liens. We didn't use the word "foreclosure."

The Court: Mr. Clerk, will you find this document he is reading in our file, please?

Mr. Jenks: The portion that he is reading is the last page, page 3; starts just at the bottom of page 2. [173]

The Court: Let's see what it says.

Well, to start out with, you don't need — you won't need to find that, I have the bank's copy.

To start out with, the document is entitled "Answer to the Third Party Complaint."

Mr. Jenks: It is the cross-complaint. Did I turn to the wrong one, your Honor? It is the same language, one is the third party complaint. Right under it. There it is.

The Court: Thank you. Answer of the United States of America to cross-complaint.

Mr. Munter: And that is the cross-complaint in interpleader brought by the bank.

The Court: This is a funny pleading, any way you want to look at it. Here's a thing called the first separate and affirmative defense. Listen to what is said there. The complaint fails to state a claim against the defendant the United States of America for which relief can be granted. That's simply a demurrer. That's no first separate and affirmative defense at all.

Mr. Munter: Well, if your Honor please,—

The Court: Don't argue now with me about that one. This is an inept pleading, any way you want to look at it. I don't know who drew it. Did you draw it?

Mr. Munter: No, Judge, I did not. I'll defend it.

The Court: We ought to have him in here to defend what he [174] has done. Second separate and affirmative defense. The United States has not consented to be sued in this form of action and therefore the court lacks jurisdiction over the United States as a defendant.

Third separate and affirmative defense. Leuschner's interest subject to tax lien.

Now, where is there anything at all in this plead-

ing that says you are foreclosing, seeking to foreclose?

Mr. Munter: We set out earlier the facts as to the basis on which we acquired the lien on the interest of Mr. Leuschner.

The Court: Yes, what you say is this interest, all of his interest is subject to the tax liens of the United States. That's what you say, boiled down that is all you say.

Mr. Munter: Right, but we do give the facts that gave rise to the lien.

The Court: Well, the assessment list and so on, I don't see that helps you out very much.

Mr. Munter: Well, there we have the facts as to the lien. Then we ask that the money be paid to us under the lien. If we had to use—remember, we are speaking of money here.

The Court: How are you going to be entitled to the principal of this trust fund—that is what you want to reach? You are not concerned alone with the installment payments of income, you are concerned in addition in reaching the corpus of the trust.

Mr. Munter: No, Judge, we only take the position that as [175] moneys become payable to Leuschner that we are entitled to them.

The Court: Oh, you don't go after the principal now?

Mr. Munter: No, Judge.

Mr. DeLew: May I ask the Government whether they are asking for a receiver on this thing as well as foreclosure?

Mr. Munter: No, Judge, we are not.

The Court: You're not asking for foreclosure either. Where, in here, do you ask for foreclosure?

Mr. Munter: Well, it's true we don't use the technical word.

The Court: Well, it isn't just technical. Let's find some substance in here of anything that has any relationship to this proposition.

Mr. Munter: We ask that under the lien the money be paid to us. Now, if we had to use the word "foreclosure," that is what exactly would have happened under our lien, by virtue of our lien, the money would have been paid to us, our lien rights would have been held to be sufficient to have money paid to us, being superior to any interest of Mr. Leuschner's. You must keep in mind, it seems to me, that the bank comes in and says, here is the money, Leuschner is claiming it and the United States is claiming it. We show that our claim to it is based upon these liens. Under those circumstances the court has recognized our liens were superior to the interest of Leuschner.

The Court: Well, not only recognize them, but I am giving [176] you a judgment to that effect, before we get through here. I don't think there is any question about Leuschner's interest being subordinate to the tax claim of the United States. That's perfectly clear.

Mr. Munter: The bank has disclaimed any interest in the fund, I believe the matter is between Leuschner and us, and ask the money be paid to us. The bank admittedly has no right to it.

Mr. Jenks: Yes, we admit, as a stakeholder, we have no interest in the present funds, but I don't think that unless there is a foreclosure that the judge could possibly render a judgment against us saying that from here on if Leuschner continues to be alive at the end of each month we pay it to the United States. I don't think that can be a proper judgment. I think if you want to foreclose the beneficial interest there should be a foreclosure action. I think if you want it, the judge is right in suggesting that as part of the interpleader action the United States have judgment for the present fund less the attorney's fees and costs of the administration.

Mr. Munter: Under your theory we couldn't have any more than was due at the time you filed your pleading.

Mr. Jenks: No, I think in an interpleader action, Mr. Munter, until the money is deposited the stakeholder hasn't stepped out of the case, so I think that as long as the stakeholder has not stepped out that there can be a proper judgment ordering the stakeholder to pay to the successful [177] litigant the amount the stakeholder has as of the date of the judgment.

Mr. DeLew: Would your Honor be kind enough to listen to counsel for Mr. Leuschner in the matter?

The Court: It depends upon what counsel for Mr. Leuschner wants to say. If you want to re-argue the proposition of Leuschner to prevail against the Government, no, I don't want to hear

anything about that, because I am perfectly clear on that.

Mr. DeLew: Well, if your Honor please, I was directing my thoughts to the present trying to assist the Court.

The Court: Good.

Mr. DeLew: In helping out in this situation. It was my view that the Court took the position that at the time of the attempted levy there was no actual sum due to Mr. Leuschner. I am not speaking about the lien, now, Judge, speaking about the time of the attempted levy. There was no fund due Mr. Leuschner at that time.

The Court: Yes.

Mr. DeLew: Now, if that's true, then——

The Court: The levy was no good.

Mr. DeLew: Yes. If that is true, then we must consider that there are only two ways the Government can take this money, either through its levy and seizure process, or through an action to foreclose. [178]

Now, if at the time the attempted levy was made there was no money there, then that falls. Your Honor has already ruled that way.

The Court: That's right.

Mr. DeLew: All right. Then the only other way that the Government can get it is either following the bank's counsel's thought of a new lien or foreclosure. Now, counsel can't argue this is a foreclosure; he can't do it.

Now, then, he goes one step farther. Perhaps, if I read his mind artistically, he then says we want

the money paid by the trust to the Government. He is at that point asking for a receiver. Who will give the bank a receipt for the money? Not the president. Who gives, under the trust—the bank has got to have a receipt for this money, somebody has to be authorized to give them that receipt.

The Court: I wouldn't have any trouble about that.

Mr. DeLew: Maybe you wouldn't, Judge.

The Court: The State Director of the Bureau of Internal Revenue would give them a receipt right quick.

Mr. DeLew: Well, I don't know.

The Court: Of course he would, or the collector. I don't know whether the collector is under the director any more.

Mr. Munter: It is the District Director they use now.

The Court: Yes, District Director. I am not worried about that. [179]

Mr. DeLew: But if the money isn't due, it wasn't due at the time of the levy, I don't see how any judgment can be given attacking that particular levy, or driving at that fund.

Now, if counsel for the Government wishes to foreclose, and, your Honor, when Mr. Dealy asked your Honor that very point, you said that you weren't giving him a suggestion——

The Court: Wasn't what?

Mr. DeLew: That you didn't intend to give him any advice on it, he would have to look to his own resources as to the matter.

The Court: The trouble we were presented with at the hearing of this case was, I found out later, that Mr. Dealy is a trial lawyer for the Government, he goes around putting the evidence on in these cases and he doesn't know a blamed thing about the research or the law. Somebody else back in Washington has got out the law, and the first thing that Mr. Dealy said to the Court was, now I am here to put the evidence on and I request your Honor give us some time to file briefs or a memorandum, and I said I don't think we are going to have any briefs or memorandum, we will decide the case here.

That presented Mr. Dealy with a problem, he hadn't researched this case and he hadn't had the benefit of the fellows who had researched the case. So here we are with a fellow whose job it is to get the evidence on. I don't know how a man can put the evidence on properly if he doesn't know [180] anything about the legal principles that control the case. But that is the way the Government is proceeding. He went from here to Texas and from Texas to Oklahoma, some place, trying lawsuits, trying them in this fashion, and the boys back on the desk in Washington expect to file memoranda in this case. In this case they are going to have to file in the Circuit. I am not interested in that. When they come out to try a lawsuit they ought to try a lawsuit, ought to be able to prepare for trial and submit the authorities, argue the authorities. The Court dug out the authorities for Mr. Dealy in this case.

Mr. DeLew: Unfortunately.

The Court: I beg your pardon?

Mr. DeLew: Unfortunately.

The Court: Well, it satisfied myself. Mr. Dealy didn't know anything about those authorities at all. It hadn't occurred to him, didn't know the point of law.

Now, that seems to me to be a poor way for the Government to be trying these cases, but be that as it may, we are here again, you fellows in the District Attorney's Office, Mr. Dealy isn't here, you fellows in the District Attorney's Office, I don't suppose you have done any thinking about this since the decision.

Mr. Munter: I assure your Honor we have.

The Court: What have been your thoughts?

Mr. Munter: Well, I sat down and very carefully analyzed [181] this and the complete answer to Mr. DeLew is this: That he is confusing the two actions. Your Honor has held that in our action, the United States versus the bank, that we are not entitled to the penalty. All right, that's settled. Now, we have an entirely separate action that has nothing to do with the levy. We can drop that word completely, and that is the action of Leuschner versus First Western Bank in which First Western Bank then cross-complained against the United States, filed an interpleader. They said, "We don't want the money, it either goes to Leuschner or to the United States." In that action we are claiming on our lien under Section 2410. We permitted to ask, by way of affirmative relief, for the foreclosure.

The Court: Oh, well, you didn't do it. I didn't think you had done it at that time and I asked you to come in again so I could review my determination about that. I don't see any place in this document where you talk about foreclosing a lien at all.

Now, if you intended in the first place—it is very unartfully drawn, this thing, any way you want to look at it. All this is affirmative and separate defense, first separate and affirmative defense. Well, it isn't an affirmative defense.

Mr. Munter: Then, your Honor, I would ask, by way of permitting——

The Court: As a matter of fact, every one of these [182] things you call an affirmative defense and affirmative defense and affirmative defense—well, when you have an affirmative defense, it's defensive, it isn't a pleading which asks for affirmative relief.

Mr. Munter: Well, if your Honor please, by way of complete settlement of this, and I am sure there will be no prejudice to any party in view of the lengthy arguments, could we amend our answer?

The Court: Well, you are up against the fact that I think your levy was void.

Mr. Munter: Another thing, Judge, the levy is not in this action. We lost on the levy in the United States versus First Western Bank. This action that we are now discussing on the pleading here is in the action of—this is the cross-complaint and interpleader filed by the First Western Bank and Trust Company. We are not claiming

anything under our levy in this action, merely asserting our lien rights.

Mr. Jenks: It seems to me, your Honor, there is nothing to amend in the answer, as I see it. I agree with your Honor on it, I think I understood you. If you are seeking affirmative relief as opposed to affirmative defense, then the United States here should have filed a cross-complaint seeking affirmative relief against the trustees and Mr. Leuschner, i.e., please foreclose our lien, and then the Court can come out with a decree of foreclosure.

The Court: I don't know whether you are trying to foreclose a claim upon the income only or whether you are trying also to foreclose your claim upon the corpus of the trust. Now, there isn't anything in this pleading that indicates one way or the other about this. As a matter of fact, if you're talking about a foreclosure, it just isn't here.

Now, we take great liberties, of course, nowadays with our notice pleadings. Was there anything in the pretrial conference order, or did you have issues framed?

Mr. Jenks: No pretrial conference order, no.

The Court: No. Now, nobody anywhere started talking about foreclosure in the pleadings or in the pretrial conference order framing issues. Here we get into the lawsuit and then we find out what we have here, we find out at the trial that this is a foreclosure trial. We take a look at the pleadings to see what is there, and there isn't any foreclosure there, as far as I can tell.

Mr. Munter: We asked for the money based on our lien, we said our lien entitles us to have the money. Now, the only thing we left out is the word "foreclosure." I don't know what else there could be.

The Court: No, it isn't.

Mr. DeLew: The lien doesn't necessarily apply, you have the right to have the money——

Mr. Jenks: I don't think the lien entitles you to the [184] money, I think the lien prohibits us from giving it to Mr. Leuschner.

Mr. Munter: Well, I would disagree on that.

The Court: I don't see any point in arguing that. Now, the thing that interests me further is still not settled, about the interpleader. If you come in and say the bank is prepared to turn over the installments of income when and if they become due.

Mr. Jenks: Up to the date that we deposit the money on the judgment, yes, your Honor, but I don't think that in this action without the foreclosure that there can be a valid judgment looking toward the fund. The theory of interpleader, as I understand it, is the stakeholder at a point puts the money on the table, gets a judgment releasing it.

The Court: I think that's right.

Mr. DeLew: But in this case, Judge, if the Government levy is invalid, not sufficient, there is nothing for the bank to put in court.

Mr. Munter: Of course there is. They have the money.

Mr. DeLew: There is nothing to put in court.

Mr. Munter: They have the money and they are advised of our lien. Regardless of what we say about the levy, we can throw that out the window, for the purpose of this argument.

Mr. DeLew: Judge, a lien is a security, it does not require that the security be brought in before this court in an [185] interpleader.

The Court: If what you say is true, counsel, you would never have a foreclosure of any kind anywhere, wouldn't need one, because all you would have to do is come in and say we claim the money, let's have it.

Mr. Munter: The normal foreclosure envisions the sale of property and a division of the proceeds to the various liens. Now, here we are dealing with money.

Mr. DeLew: Not dealing with money.

Mr. Munter: Then obviously—excuse me. Go ahead.

Mr. DeLew: You finish, please, I am sorry.

Mr. Munter: We are dealing with money and the bank came in and interpleaded the sum of money; then there can be no sale, it is just a straight application of that money to the people that are entitled to it under the lien claims.

The Court: What is the offer you make in your pleading, now?

Mr. Jenks: To deposit the money in the court.

The Court: What money?

Mr. Jenks: The fund, I think, as I recall it, your Honor, and I am quite sure I am accurate,

deposit the sum we now have and such other sums as may become payable.

The Court: Find it for me. What I would like to do is clean this thing up in this proceeding, if we can. I am endeavoring to do it, but the Government hasn't given me much [186] to work with.

Mr. DeLew: I don't think the pleadings here are such that you can, Judge.

The Court: Well, I may not be able to.

Mr. Jenks: I think the most you can do, your Honor, is to clean up the present fund less attorney's fees and administration; that's the most you can do. And I think that you would agree that in this you cannot order the payments in the future from it.

The Court: I agree to that.

Mr. DeLew: If your Honor please, in the memorandum of objections to findings that the Government filed in this matter they are suggesting that what they are looking to here is the 40 per cent interest, or whatever the interest is that Leuschner has. Now, that is not something that can be brought into this court at all.

The Court: No, certainly not.

Mr. DeLew: When I interrupted Mr. Munter, which I shouldn't have done, what I had in mind, it jumped out, was he suggested a sale, that we are dealing with money. The money that has accrued since this action is only one of the phases. The Government is reaching into the trust for Leuschner's interest. That is subject to a sale.

The Court: Well, the Government ought not to

be proceeding piecemeal about this anyway. If Leuschner has any interest, [187] whether it is an income interest or an interest in the corpus of the funds, the Government ought to proceed in one movement and go take it.

Mr. DeLew: I understand, Judge. I agree with you.

The Court: That's what the Government ought to be doing. Now, what you're doing here is asking me to foreclose and I can't foreclose any interest you have in the fund; as a matter of fact, you suggest that isn't the purpose anyway, you want to get the income. I can't give you anything more than the income payments that were due at the time this proceeding was filed. I can't give you the income payments that are falling due in the future.

Now, this is all bollixed up. If you want to know who did it, who got us into that fix, it's the Government. If we had anything to work with here by way of pleading to foreclose, that would help us resolve it.

My purpose in asking you gentlemen in this morning was to see if we couldn't find that here, but I don't see it. I just don't see it. We have to draw an entirely new pleading. What you filed is an answer. Everything you allege is first admission, second a denial and third, a defense, which you call an affirmative defense. The first one isn't an affirmative defense at all, as a matter of fact. What it is, in our practice here, a motion to dismiss.

The second one isn't an affirmative defense either. It [188] attacks the jurisdiction of the court and that is a ground for motion to dismiss.

So this is a most unartfully drawn pleading any way you want to look at it and there isn't anything in there about foreclosure. It doesn't spell out whether you are foreclosing upon the fund due at the time of the action or upon future payments or thirdly, upon the corpus. You are left entirely in doubt and the other parties to the lawsuit never had an opportunity to meet you on the issues in a foreclosure suit.

Mr. Munter: Mr. Leuschner certainly had the opportunity, was required under the bank's cross-complaint to come in and state his claim. We come in and state our claim. The Court gives it to the one whose claim is paramount.

The Court: Let me hear what you have offered to pay into this.

Mr. Jenks: I didn't refer, your Honor, to future funds. This is the cross-complaint starting here as to funds. That is the amount we had at that time.

The Court: \$6,991.65 at the time of the filing of the complaint and now holds \$7,462.89.

Well, all you are talking about turning over is the current income payment which was due at the time, I suppose, you filed this cross-complaint.

Mr. Jenks: You see, the cross-complaint was filed in the State court, your Honor. [189]

The Court: Yes.

Mr. Jenks: And if it hadn't been for the re-

moval and the filing of the new suit in this court we would have then made the motion under State procedure, an interpleader, but we got involved with these other procedures. But I don't see how your Honor can make a judgment in this action affecting future payments.

The Court: You think, however, we can properly make one concerning the payments which were due at the time of the filing of the cross-complaint?

Mr. Jenks: I think so, that \$7,000.

Mr. DeLew: I don't think so.

The Court: Why not? You don't think that levy was void?

Mr. DeLew: I think the levy was no good at all.

Mr. Munter: Conceding that for the sake of argument, what difference does that make?

Mr. DeLew: It makes all the difference in the world if the lien itself doesn't call for payment.

Mr. Jenks: I think I understand what you are saying, Mr. DeLew, see if I understand it. That even if the money had been deposited in court and the court had decided that Mr. Leuschner's rights were inferior to those of the United States, that because of the defective levy the Court could not have ordered the money paid to the United States.

Mr. DeLew: Exactly. [190]

Mr. Jenks: That is what I understood you to say.

The Court: Yes, I understand that. Well, what would the consequence be if you did pay it to the court or if you had paid it into the court? Either way it is bad. I order you to turn it over to the

United States. Leuschner might sue you and say, well, you improperly paid it into the court, it wasn't a proper levy, or the Court's judgment is in error in turning it over to the Government because there wasn't any proper levy, but that would be an empty move on Leuschner's part, because if that turned out to be true, the thing is going to happen the day after the situation is reversed, the Government's going to be in there with a proper levy, and the Government is going to be in there perhaps with a bill to foreclose.

I think the Government ought to sit down and study this case and proceed properly.

I don't see how I can foreclose any liens in this case at all. I don't believe there is any proper pleading on which to proceed to do that, and for the reasons I indicated at the hearing, I believe that levy is not valid.

Mr. Jenks: It would seem to me, your Honor, inasmuch as there is at least one other step to go, that the Government would have to take to reach some of these funds and to reach future funds, that if you sign a judgment in the form presented, then we will have cleaned up this case.

The Court: All right, give me a pen. [191]

Mr. Munter: If your Honor please, isn't it necessary that some of these other cross-complaints and third party pleadings be decided, be disposed of? There has been absolutely no disposition of those in the proposed findings.

Mr. Jenks: Mr. Munter, it is my theory that when you dismiss an action you dismiss all the

pleadings filed in that action. That provides for dismissal of that action.

The Court: Thank you very much.

Mr. Jenks: Thank you, your Honor.

The Court: I wanted to be clear about this before I leave town.

Mr. Jenks: Are you leaving at the end of the month?

The Court: Yes, I will be leaving in two or three days. I wouldn't mind coming back, but it would be a little unconscientious to make a trip out here to hear what we heard this morning.

Thank you very much. [192]

[Endorsed]: Filed June 7, 1957.

[Endorsed]: No. 15618. United States Court of Appeals for the Ninth Circuit. Richard D. Leuschner, Appellant, vs. First Western Bank and Trust Company, a California Banking Corporation, and United States of America, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: July 8, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15618

RICHARD D. LEUSCHNER, Appellant,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation and
UNITED STATES OF AMERICA,
Appellees.

STATEMENT OF POINTS ON APPEAL

The appellant, Richard D. Leuschner, hereby adopts the statement of points on appeal heretofore filed by him on May 28, 1957, in the above entitled matter, in the United States District Court for the Northern District of California, Southern Division.

Dated: July 30th, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,/s/ By SIDNEY F. DeGOFF,
Attorneys for Appellant Richard D. Leuschner.[Endorsed]: Filed July 31, 1957. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD TO BE
PRINTED ON APPEAL

The undersigned, Richard D. Leuschner, appellant, does hereby designate and request that all of the matters heretofore designated by him for inclusion in the record on appeal in the above entitled action be included in the printed docket and record on appeal.

Dated: July 30, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF and
STEIN,

/s/ By SIDNEY F. DeGOFF,
Attorneys for Appellant, Richard D. Leuschner.

[Endorsed]: Filed July 31, 1957. Paul P.
O'Brien, Clerk.

No. 15618

**United States
Court of Appeals**
for the Ninth Circuit

RICHARD D. LEUSCHNER,

Appellant,

vs.

**FIRST WESTERN BANK AND TRUST CO., a
Corporation,**

Appellee.

**Supplemental
Transcript of Record**

FILED

DEC - 9 1957

PAUL P. BISHOP, CLERK

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

No. 15618

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Court of Appeals**
for the Ninth Circuit

RICHARD D. LEUSCHNER,

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Transcript of Record**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California,
in and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and
ERIDA LEUSCHNER REICHERT,

Defendants.

COMPLAINT FOR MONEY

Plaintiff complains of defendants and for cause of action alleges:

I.

That on or about the 16th day of April, 1941, Ida Denicke Leuschner, as donor, and The San Francisco Bank, a California banking corporation, Armin O. Leuschner, Erida Leuschner Reichert and Richard D. Leuschner, as trustees, made, executed and delivered a certain trust agreement, a copy of which is attached hereto, marked "Exhibit A," and made a part thereof.

II.

That as a part of said transaction Ida Denicke Leuschner transferred and delivered to said trustees all of the property therein agreed to be transferred and delivered, and said trustees accepted said property and said trust, and entered upon the discharge

of their duties. That thereafter, and on or about April 15, 1943, the said Armin O. Leuschner, one of the trustees aforesaid, died. That thereafter, and prior to the filing of this complaint, The San Francisco Bank, a California corporation, duly and regularly changed its name to First Western Bank and Trust Company. That said First Western Bank and Trust Company, a California corporation, Erida Leuschner Reichert, and plaintiff are now and ever since the 1st day of July, 1955, have been the duly appointed and acting trustees of said trust created by Ida Denicke, Leuschner.

III.

That, among other things, said trust agreement provides for the payment to the beneficiaries therein named of certain sums during each month of the existence of said trust. That said monthly sums are computed on the basis therein set forth, namely, $\frac{1}{2}$ of 1% of the principal sum of said trust, together with all of the income of said trust.

IV.

That plaintiff herein is also one of the beneficiaries of said trust and is entitled to monthly distributions as in said trust provided.

V.

That notwithstanding the provisions of said trust, the trustees thereof, other than plaintiff as trustee, have, ever since the 1st day of July, 1955, failed, neglected and refused to pay to plaintiff any of the

sums provided in said trust to be paid for each and every month of its existence.

VI.

That, as of the date hereof, said trustees have accumulated in said trust sums in excess of \$6,994 rightfully belonging to plaintiff herein, all of which sums ought to be paid to plaintiff, and that although plaintiff has demanded said sums, defendants, as trustees, have failed and refused, and still refuse, to pay said sums to plaintiff.

VII.

That plaintiff is one of the persons for whom said trust was created, and that all of said distributions are necessary for his support.

For a Second, Separate and Distinct Cause of Action
Against Defendants, Plaintiff Complains and
Alleges:

I.

That within two years last past defendants became indebted to plaintiff in the sum of \$6,994 for money had and received by defendants for the use and benefit of plaintiff.

II.

That the defendants, though requested, have not paid the same, nor any part thereof, to the plaintiff, but refuse to do so.

Wherefore, plaintiff prays judgment against defendants, and each of them, for the sum of \$6,994, with interest thereon until paid, together with his

costs of suit incurred herein and such other and further relief as to the Court may seem meet.

.....

.....

Attorneys for Plaintiff.

Duly verified.

EXHIBIT A

Agreement of Trust

This Agreement, made this 16th day of April, 1941, by and between Ida Denicke Leuschner (hereinafter called the "Trustor"), the party of the first part, and The San Francisco Bank, a California banking corporation, having its principal place of business in the City and County of San Francisco, State of California, Armin O. Leuschner, Erida Leuschner Reichert, and Richard D. Leuschner (hereinafter called the "Trustees"), the parties of the second part,

Witnesseth:

That the Trustor, Ida Denicke Leuschner, hereby represents to the Trustees that she is the unqualified owner of all the real and personal property described in the schedule annexed hereto, made a part hereof and marked Exhibit A, and hereby grants, conveys, assigns, transfers and delivers all such property to the Trustees, in trust, however, for the uses and purposes and upon the terms and conditions set forth in this agreement.

I.

The Trustor agrees, upon demand of the Trustees, to execute and deliver to the Trustees such instruments of conveyance, transfer and further assurance and do such further and other acts as may be necessary or requested by the Trustees for more fully vesting and confirming in the Trustees, as such, the complete title to said property listed and described in said Exhibit A. With the written consent of the Trustees, any other property acceptable to the Trustees may at any time and from time to time be added to and become a part of the property forming the trust estate, and in such event the Trustees' rights and obligations with respect to such other property, when the same is properly conveyed, assigned, transferred and delivered to them as such Trustees, shall be the same as their rights and obligations with respect to the property described in said Exhibit A. In order to facilitate transfers of title pursuant to the terms of this agreement, all real property, shares of corporate stock and registered bonds which shall at any time be a part of the trust estate shall be held of record in the name of The San Francisco Bank, as Trustee, or its nominee or nominees, and title to such property may be transferred of record by said The San Francisco Bank as such Trustee.

II.

The Trustees shall collect and receive the income from the property at any time forming the trust estate of the trust created by this agreement and shall pay the entire net income from the trust estate

in monthly payments to Ida Denicke Leuschner, the Trustor, during her lifetime. After the death of the Trustor, the Trustees shall pay one-half of the entire net income of the trust estate in monthly payments to Armin O. Leuschner while he is living during the trust term; and shall pay the balance of such net income, or, while said Armin O. Leuschner is deceased during the trust term, all of such net income, plus one-half of one per cent per month of the principal of the trust estate, determined in the manner hereinafter set forth, in monthly payments as follows (the aggregate of each monthly payment made to persons other than the Trustor or Armin O. Leuschner, including both net income and principal, is hereafter referred to as the "monthly payment" and such payments are collectively referred to as "monthly payments"):

(a) If and while Frederick D. Leuschner is living during the trust term, each monthly payment shall be divided into three equal parts and one of such parts shall be paid to Frederick D. Leuschner and one of such parts shall be paid to each of Erida Leuschner Reichert and Richard D. Leuschner while they are living, and, if Erida Leuschner Reichert shall be deceased at the time any monthly payment becomes payable, the part of such monthly payment which she would have received if living shall be paid to her two daughters, Erida Leuschner Reichert, Jr., and Susan Leet Reichert, in equal shares, and, if Richard D. Leuschner shall be deceased at the time any monthly payment becomes payable, the part

of such monthly payment which he would have received if living shall be paid to his two children, Richard D. Leuschner, Jr., and Elizabeth E. Leuschner, in equal shares.

(b) If and while Frederick D. Leuschner is deceased during the trust term, each monthly payment shall be divided into five equal parts, and such parts shall be paid by the Trustees as follows: One of such parts shall be paid to Lynn Leuschner, the daughter of Frederick D. Leuschner; two of each parts shall be paid to Erida Leuschner Reichert or, if she is not living at the time such monthly payment becomes payable, one of such parts shall be paid to each of her two daughters, Erida Leuschner Reichert, Jr., and Susan Leet Reichert; and two of such parts shall be paid to Richard D. Leuschner or, if he is not living at the time such monthly payment becomes payable, one of such parts shall be paid to each of his two children, Richard D. Leuschner, Jr., and Elizabeth E. Leuschner.

(c) In the event that any of the said Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner shall be deceased during the trust term leaving issue him or her surviving who shall be living at the time a monthly payment becomes due, a part or share of which would have been paid to the decedent if living, such part or share shall be paid to such living issue in equal shares per capita, but, if no issue of such decedent be then living, the part or share of such monthly payment which the decedent would have received if living shall be paid

to the persons who are then living and entitled to receive parts or shares of such monthly payment, in respective shares of the same relative proportions as the parts or shares of said monthly payment such persons are otherwise entitled to receive bear to one another.

(d) During the minority of any person to whom any payments are required to be made hereunder, the Trustees may make such payments to the guardian of the person of such minor, or to the parent of such minor, or to the person with whom such minor resides, or directly to such minor, or otherwise as to the Trustees shall be deemed to be to the best interests of such minor, and the Trustees shall not be required to see to the application of any payment so made.

(c) In the event there shall be included in the property at any time forming the trust estate the promissory note or other obligation of any beneficiary of this trust, the Trustees shall withhold from such beneficiary all sums payable to him or her under this agreement and shall apply such sums so withheld to the payment of the principal and interest, as the same become due, upon said promissory note or other obligation until payment thereof in full. Nothing herein contained, however, shall be construed as modifying the liabilities of any such beneficiary or any other person upon any such promissory note or other obligation, or the rights and powers of the Trustees to enforce such liabilities in accordance with the terms of such promissory note or other obligation.

(f) In the event that the Trustees shall at any time during the term of this trust determine that any of said Ida Denicke Leuschner, Armin O. Leuschner, Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Lee Reichert, and Lynn Leuschner are in need of funds, on account of any illness, injury or other emergency, to provide medical, hospital, nursing and kindred services or otherwise to care for them, or any of them, and, if the Trustees shall determine that the payments, if any, made to any such person under this agreement, together with his or her income, if any, from other sources, are insufficient for such purposes, then the Trustees may at any time apply such reasonable portion of the income and/or principal of the trust estate to provide such adequate medical, hospital, nursing and kindred services and to care for such person on account of any such emergency. The Trustees in their sole discretion shall determine whether any payments shall be made under this paragraph and what sums or things are necessary or proper to accomplish the said purposes; they shall not be required to see to the application of any such payment made by them; and they shall not be responsible for any errors in judgment in determining the propriety or the amount of any such payment.

As soon as reasonably practicable after the death of the Trustor, the Trustees shall estimate the aggre-

gate value, as of the date of the death of the Trustor, of the principal of the trust estate then in the hands of the Trustees, for the purpose of determining the amount of such principal to be included in each monthly payment to be made during the balance of the year in which the death of the Trustor occurs. The amount of principal of the trust estate to be included in each monthly payment shall be one-half of one per cent of the aggregate value so estimated by the Trustees. During the month of January next succeeding the first such estimate of value made by the Trustees, and during January of each of the following nine years during the term of this trust, the Trustees shall estimate the aggregate value, as of January 1st, of the principal of the trust estate then in the hands of the Trustees, for the purpose of determining the amount of such principal to be included in each monthly payment to be made during the ensuing year, and the value estimated during the tenth January shall determine the amount of such principal to be included in monthly payments during the balance of the trust term. The amount of principal of the trust estate to be included in each monthly payment during such ensuing year (and during the balance of the trust term in the case of the value estimated during said tenth January) shall be one-half of one per cent of the aggregate value so estimated by the Trustees during the month of January of such year. Every determination of value made by the Trustees as set forth above shall be final and conclusive and binding upon all persons having any interest in this trust or the trust estate.

In the event that Armin O. Leuschner shall survive the Trustor and Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner, and the issue, if any, of the five persons last named, no further monthly payments (as the term "monthly payments" is defined above) shall be made during the balance of the trust term, and the one-half of the net income of the trust estate not disposed of by the foregoing provisions of this section II shall be accumulated by the Trustees and shall be added to and become a part of the principal of the trust estate.

III.

This trust shall terminate upon the happening of the one of the following events which is first to occur, viz.:

(a) Upon the death of the last survivor of Ida Denicke Leuschner, Armin O. Leuschner, Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert, and Lynn Leuschner;

(b) Upon the complete exhaustion of the principal and income of the trust estate by the making of the monthly payment and all other payments authorized to be made by the Trustees under this agreement.

If this trust shall terminate prior to the exhaustion of the principal and income of the trust estate,

then the entire principle of the trust estate and all accrued income therefrom, if any, then in the hands of the Trustees shall be paid to the persons who are then living and who, by the terms of this agreement, are then entitled to receive parts or shares of the next monthly payment in respective shares of the same relative proportions as the parts or shares of the next monthly payment which such persons are then entitled to receive bear to one another. If, upon such termination, there is no person then living who is then entitled, under the terms of this agreement, to receive any part or share of the next monthly payment, the entire principal of the trust estate and all accrued income therefrom, if any, then in the hands of the Trustees shall be paid in equal shares to such of the husbands and wives of said Erida Leuschner Reichert, Frederick D. Leuschner, Richard D. Leuschner, Richard D. Leuschner, Jr., Elizabeth E. Leuschner, Erida Leuschner Reichert, Jr., Susan Leet Reichert and Lynn Leuschner, and of the issue, if any, of the five persons last named as are then living and who were married to and residing with their respective spouses at the times of the deaths of such spouses. For the purposes of this paragraph, the "next monthly payment" shall be deemed to be payable at the time of the termination of this trust.

IV.

The following provisions shall govern the administration of the trust hereby created, viz.:

(a) The Trustor shall pay any and all taxes and assessments of every kind and nature, including gift

taxes and documentary stamp taxes, which may be levied or imposed upon or assessed against the Trustor as the transferor of the property forming the trust estate of the trust created by this agreement and transferred by the Trustor to the Trustees, and, in case the Trustor shall fail to pay any such taxes or assessments, the Trustees may pay the same, or any portion thereof, out of the income of the trust estate, or, if said income be insufficient, then the balance thereof out of principal. The Trustees shall pay out of the income of the trust estate, or if said income be insufficient then the balance thereof out of principal, all taxes, assessments, costs, fees and expenses of every kind and nature incurred or expended in the collection, care, administration, protection or distribution of the trust estate, for the payment of which the trust estate and/or the Trustees may become chargeable, including reasonable compensation for the services of The San Francisco Bank or any bank or trust company successor thereto, as Trustee hereunder, and for the services of attorneys employed by the Trustees in connection with the trust, excepting, however, such of said items which under the provisions hereof are, or as hereinafter provided may be determined by the Trustees to be, chargeable against principal, which said last-mentioned items shall be paid by the Trustees out of principal.

(b) In the event that any inheritance or other death taxes, however designated, shall be imposed upon the property of this trust or the interest of any

beneficiary therein, the Trustees shall pay the same when due; provided, however, that if any such tax shall be imposed partly in respect to the property of this trust and partly in respect to other property, the Trustees shall pay a proportion of the total tax equivalent to the proportion which the property subject to this trust on which such tax is imposed bears to the total property on which such tax is imposed, giving such weight to exemptions, deductions and other factors and paying, also, such part of any interest or penalty due on such tax as shall appear, in their judgment, to be reasonable and just, or as they shall, in their discretion, agree upon with the other parties interested. Any such payment of said tax shall be made by the Trustees out of and be charged to the principal of the trust estate.

(c) Whenever the principal of the trust property, or any part thereof, shall be invested in bonds, notes or other securities bought or received at a premium or discount, the persons entitled to receive the income shall be entitled to receive the full income thereof and no deduction therefrom or addition thereto shall be made for the purpose of authorizing such premium or discount, and no part of the amount received upon the maturity or redemption of any securities shall be construed as income, no matter at what price the said securities may have been purchased. All cash dividends, except liquidating dividends, shall be treated as income and all liquidating dividends shall be treated as principal. Any net profit or net loss from any sale of any prop-

erty at any time forming a part of the trust estate shall be credited or charged to principal. The Trustees shall pay for ordinary repairs to real property and tangible personal property out of income, but no reserves need be created out of income for any depreciation or destruction of trust property. The Trustees shall, except as is otherwise herein provided, reasonably determine what shall be charged or credited to income and what to principal, and shall not be liable to any person for any error of judgment made in good faith in such determination.

(d) To carry out the express purposes of this trust and in aid of its execution and the proper administration and management of the trust estate, the Trustees are vested during the continuance of the trust term with the following additional powers and discretions: At their option and as long as they may deem advisable, to retain as part of the trust estate any securities or property which may be transferred to them under this trust, whether the same are approved investments for trust funds or not, and the Trustees shall incur no liability by reason of any depreciation in the value of any such securities or property; to manage the trust estate and to have full power and authority to do any and all acts which they may deem necessary in connection therewith, including power, upon such terms and conditions as the Trustees deem advisable, (i) to sell any property at any time forming a part of the trust estate for the purpose of making any monthly payments under this agreement, or for the purpose of investing the proceeds of any such sale, or for any other purpose

in connection with this trust, and the purchaser of any property so sold shall not be required to see to the application of the proceeds of sale for the uses or purposes of this trust; (ii) to convey, lease, partition, divide and exchange any property at any time forming a part of the trust estate; (iii) to borrow money at any time and to secure the same by mortgage, deed of trust or pledge of the trust property or any part thereof; (iv) to lend money to the trust and on account of the trust estate, at current rates of interest and on terms at which similar loans are made, and to take as security for any such loan a mortgage, deed of trust or pledge of the trust property or any part thereof; (v) to deposit at any time trust funds in any savings bank or in the savings department of any bank, including the savings department of said The San Francisco Bank, and, in the event of any such deposit in the savings department of said The San Francisco Bank, such deposit shall receive the interest customarily paid on such deposits and no more, and the deposit of trust funds in a savings bank, or in the savings department of any bank, including said The San Francisco Bank, shall be a sufficient investment thereof, and any such deposit may be maintained by the Trustees as long as they may deem advisable; (vi) to pay and discharge all deeds of trust, mortgages, liens or other charges against the trust estate; (vii) to invest and reinvest any moneys at any time forming a part of the principal of the trust estate in any property, whether or not permissible by law as investments for trust funds; (viii) to have, respecting bonds,

shares of stock and other securities, all the rights, powers and privileges of an owner, including, though without limiting the foregoing, voting, giving proxies, making payments of calls, assessments and other sums deemed by the Trustees expedient for the protection of the interests of the trust estate, exchanging securities, selling or exercising stock subscription or conversion rights, participating in foreclosures, reorganizations, consolidations, mergers, liquidations, pooling agreements, voting trusts, assenting to corporate sales, leases and encumbrances; the Trustees, however, shall be under no personal liability in respect to any security at any time held hereunder; (ix) to reimburse themselves from the income and/or principal of the trust estate for any loss in liability or expense incurred by reason of their ownership or holding of any property received by them under this trust. The powers and discretions of the Trustees herein enumerated are not to be construed as a limitation upon their general powers and discretions, but the Trustees shall have the power and authority to do any and all other things which may be necessary or proper for the care, preservation and management of the trust estate.

(e) The Trustees shall not be liable for any errors of judgment made in good faith in the administration of this trust, nor for any loss or damage in connection therewith not occasioned by their wilful or wanton misconduct.

(f) Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mort-

gage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.

(g) In any case in which the Trustees are required, pursuant to the provisions of this trust, to divide any trust property into parts or shares for the purpose of distribution, the Trustees are authorized and empowered, in their sole discretion, to make such distribution in kind or partly in kind and partly in money, and for the accomplishment thereof to make such sales of the trust property as the Trustees may deem necessary, upon such terms and conditions as the Trustees shall see fit, and also to determine the relative values of any parts of the trust property. The decision of the Trustees making such division as to any matter concerning the same shall be binding and conclusive upon all persons interested in the trust.

(h) In the event that any controversy arises between the beneficiaries of this trust or between any other persons respecting this trust or this agree-

ment or any part hereof, including, though without limiting the foregoing, any controversy as to the proper person or persons to whom the trust property, or any part or share thereof, shall be paid or distributed, the Trustees shall not be required to determine such controversy but may require that the same shall be determined by appropriate legal proceedings and shall not be required to act with respect to any property which is the subject of such controversy until such determination has been made, and in the event of any such legal proceedings the Trustees shall be entitled to reimbursement for any expenses incurred by them in connection therewith, including reasonable attorney's fees.

(i) It shall be the duty of the several persons, to whom the Trustees are directed to make payments hereunder, to notify the Trustees in writing of the happening of the event or events by reason of which such persons, or any of them, may become entitled to receive any such payment, and to furnish proof to the reasonable satisfaction of the Trustees of the happening of such event or events. Any payment pursuant to the terms hereof made in good faith by the Trustees before receiving such notice and such satisfactory proof, or in reliance upon such notice and such satisfactory proof when received, shall be deemed to have been made in the lawful execution of the trust hereby created. The Trustees shall be entitled to rely upon every signature, certificate, letter, bill and document believed by them to be genuine.

(j) For their services as Trustees hereunder, The San Francisco Bank and any bank or trust company which may be successor to it as Trustee shall receive reasonable compensation, but no other Trustees shall receive any compensation for his or her services as Trustee hereunder.

V.

Any of the Trustees, other than The San Francisco Bank, may resign as Trustee at any time by delivering written notice of such resignation to The San Francisco Bank, and such resignation shall be effective upon receipt of said notice by The San Francisco Bank. The San Francisco Bank may at any time resign as Trustee by mailing written notice of such resignation to the other Trustees and to the Trustor, if she be then living, at the addresses of said Trustees and said Trustor last known to The San Francisco Bank, or, if the Trustor be then deceased, such notice shall be mailed to the other Trustees and to the then beneficiaries of this trust at their addresses last known to The San Francisco Bank. Any such resignation of The San Francisco Bank shall take effect at the expiration of 30 days from the date of mailing said notice at the United States Post Office in San Francisco, California, or any post box thereof; provided, however, that, with the written consent of the persons entitled to notice thereof, such resignation shall take effect at such earlier date acceptable to The San Francisco Bank as may be set forth in such written consent. The affidavit of any officer of The San Francisco Bank

as to the date of mailing any such notice shall be conclusive evidence thereof.

In the event that during the term of this trust Erida Leuschner Reichert shall die, become legally incompetent, or resign as Trustee hereunder, then Frederick Leet Reichert shall become Trustee hereunder in the place and stead of Erida Leuschner Reichert; or, if at such time said Frederick Leet Reichert shall be deceased or legally incompetent or not married to Erida Leuschner Reichert, or, if after becoming such Trustee, said Frederick Leet Reichert shall die, become legally incompetent, or resign as such Trustee, then and in any of such events Erida Leuschner Reichert, Jr., shall, if over the age of 21 years or upon attaining such age, become Trustee hereunder, and, if Erida Leuschner Reichert, Jr., shall be then deceased or legally incompetent, or if after becoming Trustee hereunder she shall die, become legally incompetent, or resign as such Trustee, then and in any of such events Susan Leet Reichert, if over the age of 21 years or upon attaining such age, shall become Trustee hereunder.

In the event that during the term of this trust Richard D. Leuschner shall die, become legally incompetent or resign as Trustee hereunder, then Richard D. Leuschner, Jr., shall, if over the age of 21 years or upon attaining such age, become Trustee hereunder in the place and stead of Richard D. Leuschner; or, if at such time Richard D. Leusch-

ner, Jr., shall be deceased or legally incompetent, or if after becoming Trustee hereunder he shall die, become legally incompetent or resign as such Trustee, then and in any of such events Elizabeth E. Leuschner, if over the age of 21 years or upon attaining such age, shall become Trustee hereunder.

In the event that all Trustees hereunder, other than The San Francisco Bank, and all persons named above to be Trustees hereunder shall have died, resigned or be legally incompetent to act as Trustees hereunder, The San Francisco Bank shall appoint as Trustees hereunder the two beneficiaries of this trust who are, in the sole discretion of The San Francisco Bank, best qualified to act as Trustees under this agreement.

The term "legally incompetent," as used above, shall mean finally adjudged by a court of competent jurisdiction to be an incompetent person.

VI.

The trust created by this agreement shall be irrevocable and this agreement shall not be changed or modified in any manner by the Trustor or by any other person or persons.

VII.

This agreement shall be simultaneously executed in four counterparts, each of which shall be deemed to be an original, and such counterparts together shall constitute but one and the same instrument.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

/s/ IDA DENICKE LEUSCHNER,
Trustor.

THE SAN FRANCISCO BANK,

By /s/ J. D. BAKER,
Its Vice President & Trust
Officer.

/s/ ARMIN O. LEUSCHNER,

/s/ ERIDA LEUSCHNER REICH-
ERT,

/s/ RICHARD D. LEUSCHNER,
Trustees.

[Certified Copy.]

EXHIBIT "A"—BONDS

- \$1000 Amador Valley Joint Union High School—
District of Alameda County and Contra
Costa County—5%—due May 1, 1952—Bond
No. 72 with May 1, 1941 and SCA
- \$1000 Berkeley School District of Alameda County
—State of California—5%—due May 1, 1959
—Bond No. 1419 with May 1, 1941 and SCA

- \$5000 State of California—State Highway Act—4%—due July 3, 1949—Bond Nos. 12878/81 incl., 12900 with July 3, 1941 and SCA
- \$1000 East Bay Municipal Utility District—1925 Water Bond—5% Serial Gold Bond—5%—due January 1, 1955—Bond No. 20351 with July 1, 1941 and SCA
- \$1000 East Bay Municipal Utility District—1925 Water Bond—5% Serial Gold Bond—due January 1, 1974—Bond No. 38730 with July 1, 1941 and SCA
- \$1000 Los Angeles City High School District—County of Los Angeles—4 $\frac{3}{4}$ %—due September 1, 1958—Bond No. 6600 with September 1, 1941 and SCA
- \$3000 Marin Municipal Water District—Water Bonds—5%—due October 1, 1946—Bonds Nos. 1337/1339 incl. with October 1, 1941 and SCA
- \$1000 Marin Municipal Water District—Water Bonds—5%—due October 1, 1949—Bond No. 1818 with October 1, 1941 and SCA
- \$1000 City and County of San Francisco—Water Bonds—4 $\frac{1}{2}$ %—due July 1, 1962—Bond No. 42495 with July 1, 1941 and SCA
- \$1000 San Jose Municipal Improvement—1924 City of San Jose—5%—due January 1, 1948—Bond No. 528 with July 1, 1941 and SCA

- \$1000 Stockton, City of—Harbor Bonds—4½%—due July 2, 1964—Bond No. 2720 with July 2, 1941 and SCA
- \$9500 The United States of America—Treasury Bonds—4¼%—due October 15, 1952/47—Bonds Nos. H00020938 for (5000.00 P/V), G00248027, D00321044 for (1000.00 P/V), each, K00065180, B00065182, A00065181, D00065184, C00065183 for (500.00 P/V), each—with October 15, 1941 and SCA
- \$7000 Southern Pacific Golden Gate Ferries Sinking Fund, First Mortgage, 5½%—due April 1, 1949, Nos. M2997/M3003 incl.
- \$1000 Union Rock Company, First Mortgage Serial Sinking Fund, 6% due September 1, 1941
- \$6000 Union Rock Company, First Mortgage Serial Sinking Fund, 6% due September 1, 1947

I. D. L. (Initialed)

EXHIBIT "A"—STOCKS

- 90 shares American Can Company.
- 50 shares cap. American Telephone and Telegraph Company.
- 100 shares com. American Tobacco "B."
- 462 shares com. California Packing Corporation.

- 31 shares pfd. California Packing Corporation.
- 57 shares com. Chase National Bank.
- 42 shares cap. Chemical Bank and Trust Company.
- 55 shares cap. Continental Insurance Company.
- 10 shares com. Crown-Zellerbach Corporation.
- 60 shares \$5 cum. Crown-Zellerbach Corporation.
- 18 shares E. I. DuPont de Nemours Company.
- 61 shares cap. Franklin Fire Insurance Company.
- 50 shares com. General Motors Corporation.
- 110 shares cap. Great American Insurance Company.
- 38 shares cap. Hartford Insurance Company.
- 107 shares cap. Home Insurance Company.
- 55 shares cap. National Fire Insurance Company.
- 15 shares New York Trust Company.
- 108 shares cap. North River Insurance Company.
- 45 shares 1st pfd. 7% Northwestern Electric Company.
- 100 shares com. Pacific Telephone and Telegraph Company.
- 5 shares San Francisco Bank.
- 100 shares com. Southern California Edison Company.
- 12 shares cap. Springfield Fire and Marine Insurance Company.
- 65 shares Spring Valley Water Company.
- 229 shares cap. Standard Oil Company of California.

- 100 shares cap. Texas Gulf Company.
- 290 shares com. Tide Water Associate Oil Company.
- 385 shares com. Union Oil Company.
- 2296 shares com. Anglo-California Bank.
- 835 shares Honolulu Plantation Company.
- 50 shares Urban Realty Company.

I. D. L. (Initialed)

EXHIBIT "A"—REAL PROPERTY

Clear title to 40 acres of Kadota fig orchard land in Merced County, California, known as Lots 39, 40, 41, and 42 of Ivott Subdivision, together with all appurtenances, accruals, lease rights, and growing crops.

I. D. L. (Initialed)

[Endorsed]: Filed March 8, 1956.

In the Superior Court of the State of California in
and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation, and
ERIDA LEUSCHNER REICHERT,

Defendants.

ANSWER

First Western Bank and Trust Company, one of
the defendants herein, in answer to the complaint
and each cause of action therein, admits, denies and
alleges, as follows:

I.

Admits the allegations set forth in Paragraphs I,
II, III, IV and V of the first cause of action inso-
far as they relate to this defendant.

II.

Denies generally and specifically each of the alle-
gations set forth in Paragraph VI of the first cause
of action insofar as they relate to this defendant,
and in this connection alleges that as of the date of
the complaint this defendant as one of the trustees
of said trust had on hand a fund in the amount of
\$6,991.65 payable to plaintiff under and by virtue
of the terms of said trust and that said fund would

have been paid to plaintiff as accumulated except for the fact that on the 22nd day of July, 1955, funds then payable to plaintiff and all funds thereafter to be payable to plaintiff were claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on this defendant by the United States of America, and denies that there is now any fund or sum due or payable to plaintiff by said defendant.

III.

Admits that plaintiff is one of the persons for whom said trust was created but alleges that this defendant has no information or belief sufficient for it to answer the remaining portions of Paragraph VII of said complaint and basing its denial on that ground denies each of said remaining portions generally and specifically.

In Answer to the Second Cause of Action of Said Complaint, This Defendant Admits, Denies and Alleges as Follows:

I.

Denies that within two years last past or at any time this defendant became or is now indebted to plaintiff in the sum of \$6,994 or in any sum for money had or received by this defendant for the use or benefit of plaintiff.

II.

Denies that this defendant has failed to pay to plaintiff any sums due to plaintiff from this de-

fendant, and in this connection alleges that all sums due or which became due to plaintiff since the 22nd day of July, 1955, are claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on this defendant on said day by the United States of America.

Wherefore, this defendant prays that plaintiff take nothing by reason of the complaint or any cause of action set forth therein, and that this defendant have judgment for its costs of suit, reasonable attorneys' fee, and such further relief as may be proper therein.

Dated: April 6, 1956.

ORRICK, DAHLQUIST, HARRINGTON &
SUTCLIFFE,

Attorneys for Defendant, First Western Bank and
Trust Company.

Duly verified.

[Endorsed]: Filed April 9, 1956.

In the Superior Court of the State of California, in
and for the City and County of San Francisco

No. 456519

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation, and
ERIDA LEUSCHNER REICHERT,

Defendants.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation,

Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCH-
NER REICHERT, and UNITED STATES
OF AMERICA,

Cross-Defendants.

ANSWER TO COMPLAINT

Comes now Erida Leuschner Reichert, one of the
defendants and cross-defendants, in the above-en-
titled action, and, answering the complaint on file
herein, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I, III, IV

and V of the first cause of action insofar as they relate to this defendant.

II.

Admits all of the allegations of Paragraph II of the said first cause of action insofar as they relate to this defendant, except the allegation therein contained as to the date of death of the said Armin O. Leuschner, and in that connection denies that the said Armin O. Leuschner died on April 15, 1943, and alleges that instead he died on April 22, 1953.

III.

Denies each and every all and singular the allegations set forth in Paragraph VI of the said first cause of action insofar as they relate to this defendant, and in this connection alleges that as of the date of the complaint this defendant, as one of the trustees of the said trust and with the other two trustees thereof, had on hand a fund in the amount of \$6,991.65 payable to plaintiff under and by virtue of the terms of the said trust and that fund would have been paid to plaintiff as accumulated except for the fact that this defendant was informed and believes and therefore alleges that on July 22, 1955, the funds then payable to plaintiff and all funds thereafter to be payable to plaintiff were claimed by the United States of America under and pursuant to a notice of levy in the total amount of \$207,665.42 served on defendant First Western Bank and Trust Company by the United States of America, and denies that there is now any fund or

sum due or payable to plaintiff by this defendant as such trustee.

IV.

Admits that plaintiff is one of the persons for whom the said trust was created but alleges that this defendant has no information or belief sufficient for her to answer the remaining portions of Paragraph VII of the first cause of action, and basing her denial on that ground denies each of the said remaining portions generally and specifically.

Answering the Second Cause of Action in the Said Complaint Contained. This Defendant Admits, Denies and Alleges as Follows:

I.

Denies that within two years last past, or at any time, this defendant became, or is now, indebted to plaintiff in the sum of \$6,994, or in any sum whatever, for money had or received by this defendant for the use or benefit of plaintiff.

II.

Denies each and every, all and singular, the allegations of Paragraph II of the said second cause of action.

Wherefore, this defendant prays that plaintiff take nothing by reason of his complaint, or by any cause of action set forth therein, and that this defendant have judgment for her costs of suit, rea-

sonable attorneys' fees, and such further relief as may be proper in the premises.

SLACK AND ZOOK,
JOHN E. TROXEL,

By /s/ JOHN E. TROXEL,
Attorneys for Defendant
Erida Leuschner Reichert.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 20, 1956.

In the United States District Court for the Northern
District of California, Southern Division
No. 35398

UNITED STATES OF AMERICA,
Plaintiff,
vs.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation,
Defendant.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corporation,
Defendant and Third-Party Plaintiff,

vs.

RICHARD D. LEUSCHNER and ERIDA
LEUSCHNER REICHERT,
Third-Party Defendants.

RICHARD D. LEUSCHNER,

Plaintiff,

vs.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and
ERIDA LEUSCHNER, REICHERT,

Defendant.

No. 35416

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation,

Cross-Complainant,

vs.

RICHARD D. LEUSCHNER, ERIDA LEUSCHNER REICHERT and UNITED STATES OF AMERICA,

Cross-Defendants.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 75, Federal Rules of Civil Procedure, appellant Richard D. Leuschner (third-party defendant in action No. 35398, and plaintiff and cross-defendant in action No. 35416) files herewith his statement of points on appeal:

1. The Court erred in its judgment that Richard D. Leuschner, plaintiff in civil action No. 35416, take nothing in said action, and that the same should be dismissed on the merits.

2. The right of Richard D. Leuschner as a beneficiary of the spendthrift trust involved in this case is not subject to levy by the United States of America to enforce a tax lien against said beneficiary for unpaid balance of United States income taxes.

3. The claim of the United States of America is barred by *res adjudicata* in that said claim was previously raised in bankruptcy proceedings of Richard D. Leuschner, and the final order therein resulted in a rejection of the claim of creditors, including the claim of the United States of America against the interest of said Richard D. Leuschner as beneficiary of said spendthrift trust.

Dated: May 27, 1957.

A. B. CANELO,
C. RAY ROBINSON,
M. S. HUBERMAN,
LEWIS, FIELD, DeGOFF
AND STEIN,

By /s/ SIDNEY DeGOFF,
Attorneys for Appellant.

[Endorsed]: Filed May 28, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the supplemental record on appeal herein as designated by counsel for the appellant:

Stipulation and Order Dismissing Appeal of United States of America.

Designation of Additional Matters for Inclusion in Record on Appeal.

Supplemental Transcript of Record on Removal from the Superior Court With Complaint; Answer of First Western Bank and Trust Company; Cross-Complaint of First Western Bank and Trust Company; Answer of Erida Leuschner Reichert to Cross-Complaint and Answer and Erida Leuschner Reichert to Complaint.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of October, 1957.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15618. United States Court of Appeals for the Ninth Circuit. Richard D. Leuschner, Appellant, vs. First Western Bank and Trust Co., a Corporation, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 30, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15,618

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD D. LEUSCHNER,

Appellant,

VS.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and UNITED STATES OF AMERICA,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

CHARLES K. RICE,

Assistant Attorney General.

LEE A. JACKSON,

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LYNN J. GILLARD,

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FILED

MAR 4 1958

PAUL P. O'BRIEN, CLERK

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No. 15,618

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD D. LEUSCHNER,

Appellant,

VS.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corpora-
tion, and UNITED STATES OF AMERICA,

Appellees.

On Appeal from the Judgment of the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The opinion of the District Court (R. 75-80) is not
officially reported.

JURISDICTION.

This appeal involves federal income taxes. The case
was initiated by the taxpayer suing the trustees, one
of which was the First Western Bank and Trust Com-
pany, in the Superior Court of the State of Califor-

nia, for funds claimed from the trust as a beneficiary. (R. 299-325.) The First Western Bank and Trust Company filed a cross-complaint interpleading the United States. (R. 49-52.) The United States petitioned for removal of the cause from the state court to the District Court of the United States. (R. 46-47.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1444. The judgment was entered on March 28, 1957. (R. 81-82.) Within sixty days and on April 26, 1957, a notice of appeal was filed. (R. 83.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether the District Court correctly held that the right of the United States to collect unpaid income taxes prevails over spendthrift provisions of a trust and any law of the State of California exempting a portion of the beneficiaries' rights thereunder.

2. Whether the District Court correctly held that neither the doctrine of *res judicata* nor estoppel is applicable to the case at bar, in that the question involved in this proceeding had never previously been decided in a judicial proceeding between the taxpayer and the United States.

STATUTES INVOLVED.

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*.

STATEMENT.

The taxpayer was both one of the trustees and beneficiaries of a spendthrift trust created by his mother. The First Western Bank and Trust Company, one of the trustees of this trust, was the depository of the income from the trust. (R. 77.) This case originated as a suit by the taxpayer against his co-trustees in the California Superior Court for payment of moneys due him as a beneficiary of the trust. (R. 299.)¹ The trustee bank interpleaded the United States as a cross-defendant. (R. 49-52.) The United States petitioned for removal of the cause to the Federal District Court (R. 46-47) and therein objected to being sued in an interpleader action (R. 61-64), which objection was denied (R. 68-69).

The United States sued the First Western Bank and Trust Company under the penalty provision of Section 6322(b) of the Internal Revenue Code of 1954 for failure to turn over any funds belonging to the taxpayer from the trust fund in question. (R. 3-5.) The two causes of action were consolidated by the District Court. (R. 68-69.)

The court below set out the claim of the United States for taxes as follows (R. 76):

¹Certain facts of record have been included in the statement in this brief although they were not findings of fact as listed by the District Court. It is felt by the United States that these additional facts will be of assistance to this Court.

Nature of Tax and Period	Date of Assessment	Assessment Lists Received	Amount of Assessment	Amount Paid	Notice of Tax Lien Filed	Un- Balan-
Income 1943	1/4/52	1/ 7/52	\$62,979.84	0	6/ 6/52 7/21/52	\$62,979.84
Income 1944	1/4/52	1/ 7/52	66,273.27	0	6/ 6/52 7/21/52	66,273.27
Income 1945	1/4/52	1/ 7/52	31,133.54	0	6/ 6/52 7/21/52	31,133.54
Income	2/8/52	2/11/52	13,783.74	2,477.21	8/ 7/52	11,306.53

The lower court found that subsequent to a notice of levy prepared by the United States and delivered to the bank on July 22, 1955, the bank had made no payments from the trust funds in question to the taxpayer. (R. 76-77.) The court further "found" that the bank was not subject to the penalty provisions of Section 6332(b); that the United States did not state a claim for foreclosure of its lien; and that the trustees who interpleaded the United States were entitled to attorney fees. (R. 78-79.) None of these findings has been appealed to this Court by the United States.

The District Court did "find" however, that the United States had a right to collect unpaid income taxes from the taxpayer and that this right would prevail over the spendthrift provisions of the trust and Section 859 of the Civil Code of the State of California. (R. 78-79.) Accordingly, the District Court's conclusion of law dismissed the complaint initiated by the taxpayer. (R. 79.) It is from this judgment (R. 81) that taxpayer has appealed. (R. 83.) The questions presented to this Court arise solely from this aspect of the lower court proceeding. (R. 333-334.)

SUMMARY OF ARGUMENT.

All decisions involving spendthrift trusts, the specific issue here, hold that spendthrift provisions of a trust, and provisions of state law exempting a beneficiary's interest in the trust, are ineffectual against the United States. The California statute which provides that the beneficiary's income under a trust "beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of * * * [his creditors]", is clearly an exemption statute. It is well settled that a state exemption statute can not be asserted against the United States. The California statute here is no different from a state statute exempting homesteads, which uniformly have been held inapplicable to the United States.

The authorities cited by the taxpayer are not in point. They involve property rights. Here, there is no question of the taxpayer's property rights. The taxpayer not only admits, but asserts, that the fund involved is his property. A federal lien attaches to all property and rights to property of a taxpayer; and is not extinguished by taxpayer's bankruptcy proceedings.

The doctrine of *res judicata* requires a subsequent writ for the same cause of action. If the related concept of collateral estoppel is to be invoked there must be a prior judgment on the same issue that is being subsequently litigated in addition to identity of parties in the subsequent suit. A prior decision by a ref-

eree in bankruptcy denying a claim of the bankruptcy trustee for possession of the income from the spendthrift trust in no way bars the United States in this proceeding. The trustee proceeded on a legal theory that in no way relates to the question of whether a spendthrift trust provision can prevent the United States from satisfying its tax lien from the trust income. Further, the trustee does not represent lien creditors but in effect is contesting issues with the lien creditors. An analysis of the bankruptcy situation clearly shows that the trustee was acting for the general creditors and his position was opposed to the interest of the United States.

ARGUMENT.

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE RIGHT OF THE UNITED STATES OF AMERICA TO COLLECT UNPAID INCOME TAXES PREVAILS OVER SPENDTHRIFT PROVISIONS OF A TRUST OR ANY OTHER SUMS ALLOWED A BENEFICIARY UNDER THE LAWS OF THE STATE OF CALIFORNIA.

Taxpayer argues that the lien of the United States for unpaid taxes owed by taxpayer is subordinate to the terms of the spendthrift trust pertaining to income to be paid the beneficiary and the laws of the local jurisdiction recognizing these provisions. (Br. 6-25.) The United States contends that it is a well accepted principle that spendthrift trust provisions preventing the beneficiary from alienating his interest or subjecting his interest to the claims of creditors

are ineffectual as to claims of the United States against the beneficiary.

The pertinent provisions of the trust agreement in question pertaining to the creation of the spendthrift trust read as follows (R. 315-316):

(f) Each and every beneficiary under this trust is hereby restrained from and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all the income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.

It can easily be seen that the trustor created a trust containing the usual spendthrift provisions. The laws of the local jurisdiction, California, qualifiedly recognize spendthrift trusts.

As indicated by taxpayer in his brief, California does permit a trust provision restraining alienation by the beneficiary. (Br. 6.) Section 867, California Civil Code, Appendix, *infra*. However, this provision is limited in regard to the claims of creditors. Under

Section 859 of the Civil Code of California, Appendix, *infra*, ordinary creditors can reach all income of the beneficiary except that necessary for his education and support. *Canfield v. Security First Nat. Bank*, 13 Cal. 2d 1, 87 P. 2d 830. The specific language of Section 859 states:

Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which cannot be reached by execution.

It is obvious that mere labels will not be dispositive of the issue at bar. Numerous cases have held that state statutes and spendthrift trust provisions that exempt, limit, or exclude income from the claims of creditors are ineffectual as to the tax claim of the limited states.

A leading case on the specific question before this Court is *In Re Rosenberg's Will*, 269 N.Y. 247, 199 N.E. 296, certiorari denied, *sub nom. Rosenberg v. United States*, 298 U.S. 669. The New York statutes permitted creations of spendthrift trusts; however, beneficiaries were limited to income need for support and then only to ninety per cent of the trust income payable, the remaining income being subject to the claims of creditors. The question presented to the court was whether the United States could prevail

over the interest of the spendthrift as derived from the New York statutes.² The court in answering this contention stated (199 N.E. 207) :

The fundamental policy to be borne in mind is that the right of property is a right *cum onere*. A person may not ordinarily have ownership of or right to enjoy property and at the same time be able to keep it from the claims of creditors and others. Cf. *Hallett v. Thompson*, 5 Paige, 583, 586. An individualistic cross-current came to permit fathers of improvident sons, by way of exception, to insure a sum necessary for education and support (Real Property Law, § 98) in order to protect them from their own extravagance and to prevent them from becoming public charges. Nevertheless, under the pressure of special circumstances, that apparently unreachable sum had been permitted by the courts to be reached. *Wetmore v. Wetmore*, 149 N.Y. 520, 44 N.E. 169, 33 L.R.A. 708, 52 Am. St. Rep. 752, and see 43 Harvard Law Rev. 63. It is by no means certain that our state policy excludes the payment of state taxes and other possible claims by the state from the category of necessary support. A tax in some form nowadays is at least as certain as, say medical or legal expenses.

However that may be, it is certain that no policy of this state may interfere with the power of Congress to levy and collect taxes on income. *Burnet v. Harmel*, 287 U.S. 103, 110, 55 S. Ct. 74, 77

²The case stated that the lien of the United States was filed subsequent to the lien of other creditors; therefore, the other creditors were entitled to the provision granting ten percent of trust income to creditors. 199 N.E. 208.

L. Ed. 199; *United States v. Snyder*, 149 U.S. 210, 214, 13 S. Ct. 846, 37 L. Ed. 705. Cases where state exemptions have been applied to the collection of judgments in favor of the United States have been in every instance predicated on the statutory adoption of state exemptions. *Fink v. O'Neil*, 106 U.S. 272, 1 S. Ct. 325, 27 L. Ed. 196; *Custer v. McCutcheon*, 283 U.S. 514, 51 S. Ct. 530, 75 L. Ed. 1239.

And cf. *Aquilino v. United States*, decided December 12, 1957 (1958 C.C.H. # 9191), a recent decision of the Court of Appeals of New York in which the Court stated: "It is, by now, exceedingly well settled that no state-created rule may defeat the paramount right of the United States to levy and collect taxes uniformly throughout the land."

It is clear that the *Rosenberg* case is directly in point. The case gains added significance when it is recognized that the California statute concerning this matter was adopted from a statute of the State of New York—the jurisdiction that decided *Rosenberg*. *Canfield v. Security-First Nat. Bank*, *supra*, p. 14.

Taxpayer attempts to distinguish the *Rosenberg* case by stating that the court was faced with the alternative of deciding the case as it did or exempting ninety per cent of the funds derived from the spendthrift trust. Obviously this attempted distinction fails for the question there as here was whether a spendthrift trust provision can prevail over the lien of the United States. It was directly held that it could not.

It also is completely contrived in that there is no allusion in the decision whatsoever that the Court was concerned with this "alternative." (Br. 20-21.)

That the creation of a spendthrift trust will not defeat a claim of the United States against the beneficiary is not limited to the aforementioned decision. It has been recognized and followed by all other decisions of which we are aware. *United States v. Dallas Nat. Bank*, 152 F. 2d 582 (C.A. 5th); *United States v. Canfield*, 29 F. Supp. 734 (S.D. Cal.), appeal dismissed, *sub nom. Security-First National Bank v. United States*, 113 F. 2d 491 (C.A. 9th); *Mercantile Trust Co. v. Hofferbert*, 58 F. Supp. 701 (Md.); *United States v. Mercantile Trust Co.*, 62 F. Supp. 837 (Md.); *United States v. City of Greenville*, 118 F. 2d 963, 965 (C.A. 4th); Restatement of Trusts (1948 Supp.) §157(d); Scott, Trusts (1948 Supp.) §157.4; Griswold, Spendthrift Trusts (2d ed., 1947), §§342, 345.

In *United States v. Canfield*, *supra*, the court stated (p. 736):

It has been unquestionably settled that Canfield at all times involved in this action had an interest in the income of the trust created and vested by his father's will. And it can no longer be disputed that Canfield's right to receive income from the trust was and is property or a right to property belonging to Canfield, which was reachable by the United States in satisfaction of the government's unpaid tax claim under Section 1610. 26 U.S.C.A. *Canfield et al. v. Security-First National Bank*, *supra*, *Matter of Rosenberg's Will*, *supra*.

We also find from the record before us that the government's right and lien upon Charles O. Canfield's portion of the income from the testamentary spendthrift trust is and has been at all times paramount and preferential to the rights or claims of all other defendants herein.

In *Mercantile Trust Co. v. Hofferbert*, *supra*, p. 705:

The reasons which have actuated some courts, as in Maryland, to uphold spendthrift trusts against the claims of creditors do not necessarily apply to tax claims of the government either federal or state. *Griswold, supra*, § 342, p. 302. The public policy involved is quite different. In the one case the doner of the property has the right to protect the beneficiary against his own voluntary improvident or financial misfortune; but in the other the public interest is directly affected with respect to collection of taxes for the support of the government. The imposition of the tax burden is not voluntary by the beneficiary. In a sense the property itself incurs the tax; or rather the property is held *cum onere*.

The statute involved here is no different from the state statutes which exempt homesteads. It is well settled that such statutes may not defeat the Government's collection of taxes. The Government has its own exemption statute, Section 6334 of the Internal Revenue Code of 1954. Such a statute, enacted to effectuate constitutional power, is the supreme law of the land. If it is in conflict with state law, constitutional or statutory, the latter must yield. See *Sham-*

baugh v. Scofield, 132 F. 2d 345 (C. A. 5th); *United States v. Greenville*, 118 F. 2d 963, 965 (C. A. 4th); *Jones v. Kemp*, 144 F. 2d 478 (C. A. 10th), and the cases cited therein.

Blair v. Commissioner, 300 U. S. 5; *Uterhart v. United States*, 240 U. S. 598; *Spindle v. Shreve*, 111 U. S. 542; *United States v. Winnett*, 165 F. 2d 149 (C. A. 9th) cited by the taxpayer are not applicable here. None of these cases, nor any other relied upon by the taxpayer, relate in any way to an authorization of a state provision defeating a tax lien of the United States by reason of declaring that certain funds of the debtor are free from claims of his creditors.

Here, there is no question of the rights of third parties. It is clear that the Government seeks to collect from property of the taxpayer. In this very suit the taxpayer is claiming, not only that he is entitled to the fund interpleaded, but also that he is entitled to monthly payments "during each month of the existence of said trust." (R. 300-301.)

II.

THE QUESTION PRESENTED FOR THIS PROCEEDING HAD NEVER BEEN PREVIOUSLY DECIDED IN A JUDICIAL PROCEEDING INVOLVING THE TAXPAYER AND THE UNITED STATES. THE DISTRICT COURT CORRECTLY DECIDED THAT NEITHER THE DOCTRINE OF RES JUDICATA NOR ESTOPPEL IS APPLICABLE AS TO THE CASE AT BAR.

Taxpayer asserts in his brief that the instant question regarding a spendthrift trust defeating the claim of the United States had been decided in a prior bankruptcy proceeding. (Br. 25-40.) The District Court prepared no written findings of fact nor conclusions of law as to this specific matter; however, it did consider this question during the trial itself. (R. 75-80, 257-260.) The court orally decided that the issue presented in the bankruptcy proceeding involved an entirely different issue than the question presented by the then present case. (R. 257-260.)

A review of the facts of the case and law concerning this area unquestionably supports the District Court's decision. It is obvious from the case record that the District Judge decided the question of whether a trustee in bankruptcy can take the income of a spendthrift trust for the benefit of the creditors, but that decision can be of no concern to the question of whether the United States can prevail against a spendthrift trust in a suit to enforce its lien under the Internal Revenue Code. (R. 257-259.) It must be noted that the Federal Bankruptcy Act, although created by Acts of Congress, nevertheless recognizes state exemptions for the benefit of the Bankrupt.³ Sec.

³However, tax claims are not extinguished by bankruptcy. See Section 6873 of the 1954 Internal Revenue Code.

6, Appendix, *infra*. *Hanover National Bank v. Moyses*, 186 U. S. 181; *Turner v. Bovee*, 92 F. 2d 791 (C. A. 9th); *Burns v. Kinzer*, 161 F. 2d 806 (C. A. 6th); *In re Johnson*, 97 F. Supp. 779 (S. D. Cal.), reversed on other grounds, 195 F. 2d 717. The trustee in bankruptcy can obtain only the interest in the bankrupt's estate that the bankrupt possessed as of the date of bankruptcy as determined by the local law. *Zartman v. First National Bank*, 216 U. S. 134; *Schultz v. England*, 106 F. 2d 764 (C. A. 9th); *Martin v. New York Life Ins. Co.*, 104 F. 2d 573 (C. A. 7th), certiorari denied, 308 U. S. 594. The cases have held that the interest of a beneficiary of a spendthrift trust cannot be reached by the trustee in bankruptcy since the bankrupt-beneficiary did not have the power to alienate or encumber the interest. *Eaton v. Boston Trust Co.*, 240 U. S. 427; *Ashton v. Sentney*, 145 F. 2d 719 (C. A. 9th); *Rountree v. Land*, 155 F. 2d 471 (C. A. 4th); *Danning v. Lederer*, 232 F. 2d 610 (C. A. 7th); *Jones v. Harrison*, 7 F. 2d 461 (C. A. 8th), certiorari denied, 270 U. S. 652. Clearly, the question of whether a trustee in bankruptcy can reach the interest of a bankrupt beneficiary of a spendthrift trust is an entirely different question than whether a spendthrift trust provided by state law can defeat a claim of the United States for a tax lien. *Mercantile Trust Co. v. Hofferbert*, *supra*, p. 704. A different cause of action was presented in the bankruptcy proceeding than the present cause of action. Consequently, there is no basis for an assertion for the defense of *res judicata* nor could a claim of collateral estoppel succeed.

As is evident from the exhibits introduced in the trial court by the taxpayer, the trustee in bankruptcy though overruled by the referee, denied the exemption requested by the bankrupt (the taxpayer in the instant case). (Ex. C; R. 183.) The brief filed by the trustee in bankruptcy before the referee in bankruptcy conclusively shows that the trustee denied the claim of the bankrupt for a reason that is certainly not in issue in this instant proceeding. The bankruptcy trustee's brief states (Ex. D, p. 6):

It is extremely important to note that the trustee has no discretion in the administration of the trust to withholding or modifying or postponing the amounts payable to the beneficiary according to the formula as determined in the trust agreement. The amounts as determined in the agreement must be paid by the trustee every month. Accordingly, since the bankrupt as of the time of the filing of the Petition could have made an assignment of part of his interest effective as to amounts when they became accrued and payable, the interest in the trust was transferable to that extent and passed to the trustee, and further, the bankrupt had a power with respect to his interest in the trust as to such amounts which he could have assigned for his own benefit which similarly passed to the Trustee in Bankruptcy and which the Trustee can exercise during the pendency of these proceedings.

Nowhere in the brief of the trustee in bankruptcy is the legal position of the United States mentioned. The argument relied upon by the United States in

the court below and in this Court was never discussed by either the bankruptcy trustee or referee. The issue presented therein is not and has never been relied upon by the United States. The referee in bankruptcy decided only the question urged by the trustee in bankruptcy in his capacity of representing the general creditors. (Ex. C.)

It is difficult to perceive how an argument could be made by the taxpayers that the trustee in bankruptcy was representing the United States in the bankruptcy proceeding. The United States' claim for unpaid taxes became tax liens long before the bankruptcy proceeding commenced. (R. 76.) Consequently, the United States was not a general creditor nor a priority creditor under Section 64 of the Bankruptcy Act⁴ but rather a lienholder under Section 67 (Appendix, *infra*.) Under the latter statute, the lienholder occupies a position antagonistic to the general creditors as represented by the trustee. *Small-Ferrer v. Ware*, 68 F. 2d 366 (C. A. 4th); *Matney v. Combs*, 171 Va. 244, 198 S. E. 469. The assets obtained by the lienholders are obviously never available for distri-

⁴We are well aware that the petition in bankruptcy was filed (July 6, 1955) prior to the date the levy was made upon the trustee-bank (July 22, 1955); and that as to personal property of a bankrupt which a trustee in bankruptcy is entitled to take over, a statutory lien thereon unless accompanied by possession is subordinated to administrative expenses and certain wage claims under Section 104. However, we submit that where, as here, the trustee is not entitled to take property, but the United States is so entitled, its lien is not subjected to the provisions of Section 104; that in such circumstances the rights of the United States are the same as though the taxpayer had not taken bankruptcy.

bution to trustee for the priority or general creditors. In the bankruptcy proceeding in question the trustee was attempting to obtain property that would be available for all the creditors. If he had prevailed, he would not only have defeated the claim of the bankrupt taxpayer but also affected adversely the rights of the United States in an asset available to satisfy the claim of the United States, who prior to trustee's denial of exemption had subjected the spendthrift trust income to levy for satisfaction of its tax lien. Hence, in fact the ruling in the bankruptcy proceeding was favorable to the United States.

Taxpayer's assertion that the United States should be barred by the doctrine of *res judicata* from contesting the instant question is without merit. The cause of action herein bears no relation to the cause of action involved in the bankruptcy suit. The issue presented in this suit is far different from the issue present in the bankruptcy proceeding. The United States as a lienholder cannot be deemed to be in privity with the trustee in bankruptcy who was prosecuting a cause of action that would be against the interest of the United States. Clearly, neither the doctrine of *res judicata* nor collateral estoppel are applicable to the present cause. *Commissioner v. Sunnen*, 333 U. S. 591.

CONCLUSION.

For the reasons above-stated, the judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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February, 1958.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Supp. II, Sec. 6321.)

Bankruptcy Act, c. 541, 30 Stat. 544:

SEC. 6. [as amended by Sec. 1, Act of June 22, 1938, c. 575, 52 Stat. 840]. EXEMPTIONS OF BANKRUPTS.

This title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: *Provided, however,* That no such allowance shall be made out of the property which a bankrupt transferred or concealed and which is recovered or the transfer of which is avoided under this title for the benefit of the estate, except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount

secured thereby, such allowance may be made out of such excess.

(11 U.S.C. 1952 ed., Sec. 24.)

SEC. 64 [as amended by Sec. 1, Act of June 22, 1938, *supra*]. DEBTS WHICH HAVE PRIORITY.

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (4) taxes legally due and owing by the bankrupt to the United States or any state or any subdivision thereof: *Provided*, That no order shall be made for the payment of a tax assessed against the property of the bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court: *And provided further*, That in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; and * * * .

* * * * *

(11 U.S.C. 1952 ed., Sec. 104.)

SEC. 67. [as amended by Sec. 1, Act of June 22, 1938, *supra*]. LIENS AND FRAUDULENT TRANSFERS.

* * * * *

(b) The provisions of section 96 of this title to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the

trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this title by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

* * * * *

(11 U.S.C. 1952 ed., Sec. 107.)

California Civil Code:

SEC. 859. [*Rents and profits liable to creditors in certain cases.*]

Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which cannot be reached by execution.

SEC. 867. [Restraining disposition of trusts.] The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust.

No. 15,618

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHARD D. LEUSCHNER,

Appellant,

VS.

FIRST WESTERN BANK AND TRUST COMPANY, a California Banking Corporation, and UNITED STATES OF AMERICA,

Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

JAN 23 1939

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No. 15,618

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD D. LEUSCHNER,

Appellant,

VS.

FIRST WESTERN BANK AND TRUST COM-
PANY, a California Banking Corpora-
tion, and UNITED STATES OF AMERICA,

Appellees.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

The appellant Richard D. Leuschner commenced action No. 35,416, for the payment of funds due him on account of support and maintenance as a beneficiary under the terms of a spendthrift trust, in the Superior Court of the State of California, in and for the City and County of San Francisco. (R. 299.) The defendants were the First Western Bank and Trust Company and Erida Leuschner Reichert who, with appellant, were the three co-trustees of said spendthrift trust. The First Western Bank filed a cross-complaint against plaintiff, its co-defendant, and

United States of America. (R. 49.) The United States thereafter petitioned for removal to the United States District Court for the Northern District of California, Southern Division (R. 46), and this action was removed thereto pursuant to the provisions of Title 28, United States Code, §1444, in that it was an action brought under §2410, Title 28, United States Code, against the United States in a state court.

The United States of America, as plaintiff, also commenced an action No. 35,398 in the United States District Court for the Northern District of California, Southern Division, pursuant to the provisions of the Internal Revenue Code, Title 26, United States Code, §6332(b), against the First Western Bank, as defendant. (R. 3.) Both cases were consolidated for trial (R. 68), and were tried before Willis W. Ritter, United States District Judge, sitting without a jury. Judgment was entered on March 28, 1957. Notice of appeal was filed April 25, 1957. The jurisdiction of this Court is invoked under Title 28, United States Code, §1291.

STATEMENT OF THE CASE.

Appellant commenced an action in the State Court against the First Western Bank, as trustee, to compel the payment of \$6,994, accrued to him since July 1, 1955, as a beneficiary of a trust which provided for the payment to beneficiaries, including appellant, of monthly payments equal to one-half of one per cent of the principal sum of said trust, together with all of the income thereof. A copy of said trust agreement

was attached as an exhibit to his complaint. Said trust agreement additionally provides in part, as follows:

“Each and every beneficiary under this trust is hereby restrained from, and shall be without right, power or authority to sell, transfer, pledge, mortgage, hypothecate, alienate, anticipate or in any other manner affect or impair his, her or their beneficial and legal rights, titles, interests, and estates in and to the income and/or principal of this trust during the entire term hereof; nor shall the rights, titles, interests and estates of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary, and all income and/or principal of this trust shall be transferable, payable and deliverable solely to the beneficiaries as herein provided, and the Trustees may require the personal receipt of any beneficiary as a condition precedent to the payment of any money or other property to such beneficiary.”

The Trustees answered that the funds would have been paid to him in accordance with the trust, except for the fact that on July 22, 1955, all funds then and thereafter to become payable to appellant, were claimed by the United States of America under notice of levy in the total amount of \$207,665.42. (R. 326 and 329.)

Contemporaneously, the United States of America commenced an action in the United States District Court against the First Western Bank, demanding the payment of all funds accumulating to the account of Richard D. Leuschner, pursuant to its aforesaid

notice of levy, plus a statutory penalty for the alleged failure and refusal of the First Western Bank to surrender said funds.

Both actions were consolidated for trial, and in the course of preparation for trial it was stipulated that when said notice of levy was made it was not addressed to any of the Trustees, but was addressed only to a Trust Officer of the First Western Bank. It was further stipulated that all funds payable to beneficiaries under the trust were deposited in a commercial account and withdrawn by check signed by a Trust Officer of the bank.

The evidence disclosed, without contradiction, and the Court found that on July 22, 1955, when notice of levy was given to the Trust Officer, none of the income or corpus of the trust was due to appellant. (R. 78.)

The Court further found that the rights of the United States of America to collect unpaid income taxes from Richard D. Leuschner, the appellant, must prevail over the provisions of the spendthrift trust, and that it was unnecessary for the Court to determine whether the sum of \$750 per month was necessary for the support and maintenance of Richard D. Leuschner (R. 79), although in this connection it was stipulated that had appellant been called upon to testify, he would have testified that \$750 per month was necessary for his support and maintenance. (R. 34 and 39.)

The Court made no finding of fact or conclusion of law on the issue raised by appellant's amended

answer that the claim of the United States was barred by the defense of *res judicata*, and that the United States was estopped from asserting any claim against the funds due to appellant from the spendthrift trust. (R. 30.)

QUESTIONS PRESENTED.

1. Whether, to the extent necessary for support and maintenance, the interest of a beneficiary of a spendthrift trust established under California Law, is subject to levy by the United States, or whether only such excess over and above the amount necessary for a beneficiary's support and maintenance is subject to levy by the United States.

2. Whether the claim of the United States is barred by *res judicata*, based on the decision of the Referee in Bankruptcy denying to the Trustee in Bankruptcy representing the United States and other creditors, the right to seize, levy on or sequester appellant's interest in said spendthrift trust.

SPECIFICATION OF ERRORS.

1. The Trial Court erred in finding that the rights of the United States must prevail over the provisions of the spendthrift trust.

2. The Trial Court erred in failing to find that \$750 per month was necessary for the support and maintenance of the appellant as beneficiary of the spendthrift trust.

3. The Trial Court erred in failing to find that the claim of the United States was barred under the doctrine of *res judicata*.

ARGUMENT.

- I. THE IMMUNITY OF THE INCOME OF A BENEFICIARY OF A SPENDTHRIFT TRUST NECESSARY FOR HIS SUPPORT AND MAINTENANCE IS NOT DERIVED UNDER CALIFORNIA LAW FROM AN EXEMPT STATUS, BUT IS BASED ON A LIMITED PROPERTY RIGHT. THE RIGHTS OF THE UNITED STATES IN ANY PROPERTY ON WHICH A TAX LIEN OR LEVY HAS BEEN PLACED ARE NO GREATER THAN THE RIGHTS OF ITS DEBTOR. THEREFORE, THE CLAIM AND LIEN OF THE UNITED STATES IS SUBORDINATE TO THE TERMS OF THE SPENDTHRIFT TRUST.

Unlike many jurisdictions which have recognized the validity of spendthrift trusts, the California courts have uniformly held that the interest of a beneficiary therein is a *conditional* property right rather than an unqualified interest exempt from the claims of creditors.

Section 867 of the Civil Code of the State of California provides:

“The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity, out of such rents and profits, may be restrained from disposing of his interest in such trust during his life, or for a term of years by the instrument creating the trust.”

Section 859 of the Civil Code of the State of California further provides:

“Where a trust is created to receive rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person in the same manner as personal property which cannot be reached by execution.”

One of the leading cases in California construing these sections and establishing that the beneficiary's interest is a property right *limited* by the conditions of a spendthrift trust, is *McColgan v. Walter Magee* (1916) 172 Cal. 182, 155 Pac. 995.

In that case the Court said at page 997:

“Section 867 of the Civil Code provides that such trusts may be created in the rents and profits of real property, provided the beneficiary is restrained from disposing of his interest therein only during his life or for a term of years. Such trusts in real property are further qualified by the provisions of Section 859 of the Civil Code. *Magner v. Crooks*, 139 Cal. 640, 73 Pac. 585. It has also been held that trusts of similar character may be created in the income of personal property. *Cutter v. Hardy*, 48 Cal. 568. The general doctrine that spendthrift trusts, inalienable by the beneficiary and inaccessible to his creditors during his life or for a term of years, are valid in this state, is well established. *Seymour v. McAvoy*, 121 Cal. 442, 53 Pac. 946, 41 L.R.A. 544.

“The doctrine that property may be made inalienable by such declaration of trust rests upon

the theory that a donor has the right to give his property to another upon any *conditions* which he sees fit to impose, and that, inasmuch as such a gift takes nothing from the prior or subsequent creditors of the beneficiary to which they previously had the right to look for payment, they cannot complain that the donor has provided that the property or income shall go or be paid personally to the beneficiary and shall not be subject to the claims of creditors. * * * In *Seymour v. McAvoy*, supra, referring to the first branch of the proposition above stated, the court said:

“ ‘There is noting in the policy of the law prohibiting a donor from providing that his bounty shall be enjoyed only by those to whom he intends to extend it, and that the property devoted by him to a trust otherwise valid shall not be diverted from its appointed destination.’ ”

“In *Pacific Bank v. Windram*, 133 Mass. 175, the court said:

“ ‘Creditors of the beneficiary have no right to complain that the founder did not give his property for their benefit, or that they *cannot reach a greater interest in the property than the debtor has, or ever had.*’ ”

* * * * *

“In *Brown v. Macgill*, 87 Md. 161, 39 Atl. 613, 39 L.R.A. 806, 67 Am. St. Rep. 334, the court said:

“ ‘The theory upon which courts have held restraints upon alienation, etc. valid, is that *the cestui que trust only has what the donor has given him—is the recipient of his bounty—and therefore if the donor has not given him the right to alienate the property, or made it subject to the*

payment of his debts, no one has the right to complain. * * * ' ' ' (Emphasis added.)

The other leading case is *Canfield v. Security First Bank* (1939) 13 Cal. (2d) 1, 87 Pac. (2d) 830, where the Court said at Pages 835-6:

“At common law, and in some American states, spendthrift trusts are invalid. These jurisdictions hold that it is against public policy to permit a debtor to have the use and enjoyment of wealth while his creditors go unpaid. As opposed to this view, the majority of the American states have recognized the validity of spendthrift trusts, at least within certain limitations, either by judicial decision or by special statute. The general theory of most of these cases seems to be that the donor of property has the right to choose the object of his bounty, and has the right to protect his gift from the creditors of the donee. Occasionally, an additional factor has been emphasized—namely, that *the protection of impecunious beneficiaries is in accord with public policy, at least to the extent of keeping such beneficiaries from becoming public charges.*

has thus placed a statutory limitation or restraint on the unlimited power of a donor to give his property to whom he may desire *subject to whatever conditions the donor may want. At the same time, in recognition of the fact that public policy also requires that impecunious beneficiaries should be protected from their creditors so as to prevent them from becoming public charges, the legislature has provided that the amount of income necessary for their 'education and support' shall be free from the claims of creditors.*" (Emphasis added.)

The limited property right theory has received additional recognition in 25 Cal. Jur. 324, Trusts § 174, where the text declares:

"Where a trust is created for the benefit of another, the beneficiary may be restrained by appropriate provisions of the trust instrument from disposing of his interest or ownership. So far as the beneficiary is concerned, it seems that a provision against alienation is binding and effectual according to its terms, *the theory being that the trustor or testator, having a right to give or withhold the property, may, in giving to the beneficiary the rents, profits or interest, limit the beneficiary's interest or ownership therein by any conditions that he may see fit to impose.* The trustor or testator may also effectually provide that the interest of the beneficiary shall not be subject to the claims of the beneficiary's creditors,—at any rate, to the extent that the rents or income of the trust property are shown to be necessary to the education or support of the beneficiary. Trusts containing such provisions have

been denominated 'spendthrift' trusts, and their validity has long been recognized." (Emphasis added.)

Although the federal courts are not required under the United States Constitution to enforce state "exemption" statutes which conflict with the United States Constitution and laws duly enacted thereunder, the federal courts must follow and enforce applicable rules of property established by the courts in any state where the property involved is situated.

In *Blair v. Commissioner of Internal Revenue* (1937) 300 U.S. 5, 57 S. Ct. 330, the petitioner assigned to his children certain income which he derived from a testamentary trust established by his father. The United States claimed that petitioner's interest was not assignable because he was the beneficiary of a spendthrift trust. Therefore, the entire income of the trust should be taxed to him. The State Court, however, had held that the trust in question was not a spendthrift trust. In denying the Government's claim, the Supreme Court said at pages 9-10:

"The question of the validity of the assignment is a question of local law. The donor was a resident of Illinois and his disposition of the property in that state was subject to its law. *By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest, in whole or in part, are to be determined. The decision of the State Court upon these questions is final.*" (Citing cases.) (Emphasis added.)

So, in the case at bar, the nature and extent of the interest of Richard D. Leuschner as beneficiary of the spendthrift trust is to be determined by California—not by federal or general law. Since California has established, beyond question, that the beneficiary of a spendthrift trust has only a limited and conditional property right in the trust in so far as it is necessary for his support and maintenance, that decision is final and binding on the federal courts which must follow it.

In *Uterhart v. United States* (1916), 240 U.S. 598, 36 S. Ct. 417, 60 L. Ed. 819, the taxpayer brought a suit for refund of estate taxes paid under a law allowing refund for taxes paid on a contingent interest. The United States Court of Claims denied the refund on the ground that, in its opinion, the interest taxed was not contingent, but vested. In *reversing* the decision, the Supreme Court said at page 603:

“ * * * it is obvious that a judicial construction of the will by a state court of competent jurisdiction determines not only legally but practically the extent and character of the interest taken by the legatees.”

Likewise, in our case, the judicial construction placed on a spendthrift trust by California courts with respect to a trust established by a resident of California in property located in California, for the benefit of beneficiaries residing in California, must determine legally and practically the extent and character of the beneficial interest, subject to seizure or levy by the United States.

In *Spindle v. Shreve*, 111 U.S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884), a trustee in bankruptcy claimed that he was entitled to subject to bankruptcy proceedings a beneficiary's interest in a spendthrift trust. In denying such claim, the Supreme Court said, pages 547-8:

“The case has been argued by counsel as if it depended upon, or at least, involved the question whether, upon general principles of equity jurisprudence, as administered in the courts of the United States, the terms of the trust in favor of Charles U. Shreve, under his father's will, exceeded the limits fixed for restraints upon the alienation of property held for the beneficial use of the *cestui que trust*, and its exoneration from the liability to be taken for payment of his debts. *It cannot be doubted that it is competent for testators and grantors, by will or deed, to construct and establish trusts, both of real and personal property, and of the rents, issues, profits and produce of the same, by appropriate limitations and powers to trustees, which shall secure the application of such bounty to the personal and family uses during the life of the beneficiary, so that it shall not be subject to alienation, either by voluntary act on his part or in invitum, by his creditors. The limits within such provisions may be made and administered, of course, must be found in the law of that jurisdiction which is the situs of the property, in case of real estate, and, in cases of personalty, where the trust was created or is to be administered, according to circumstances. And in determining those limits that law declares how far, and by what forms and modes, the institution of property may be per-*

mitted to accommodate itself to the will and convenience of individuals, without prejudice to public interest and policy; by what limitations and instruments its usual incidents may be affected and altered, so as to effectuate the intentions of parties; how far the dominion, implied in the idea of property, may be extended so as to limit the future dominion of those who succeed to its beneficial enjoyment.

“It follows, therefore, that the judgment in each case must be determined by the positive provisions of the law of the locality which governs it, and the particular terms of the instrument by which the scheme is framed. And, applied to the circumstances of the present case, the question would be merely, whether, according to the law of Illinois, the terms of the trust, established under the will of Thomas T. Shreve, created an interest or estate in the beneficiary, which, not having been previously conveyed to another, could be taken at law or in equity for payment of his debts, and which, therefore, vested in his assignee in bankruptcy. That question, as we have already shown, so far as required by the case, is answered by the declaration that, as nothing has been assigned to the appellant except what had not been previously conveyed and could lawfully be subjected to the payment of his debts, and as the interest in question was either vested in Buchanan or could not be so subjected, by reason of the positive provisions of the statute of Illinois, to which we have referred, the appellant has shown no right to the relief for which, in his bill, he prayed.

“The decree of the circuit court is accordingly affirmed.” (Emphasis added.)

The same reasoning applies to the facts of the instant case. Under California law, the donor had the right to create a spendthrift trust, in which appellant obtained only a limited and conditional right. These limits must be found not in federal law, even though supreme in the field of bankruptcy, but in the law of the State of California, which is the *situs* of the property where the trust was created and is administered. In determining those limits, California law, not federal or general law, declares how far the institution of private property may be permitted to accommodate itself to restraints without prejudice to public interest and policy. It follows, therefore, that the judgment in this case must be determined by the positive provisions of California law. If appellant had only a limited and conditional interest in the corpus and income of the spendthrift trust, then only that limited and conditional interest may be reached by the levy of the United States. California law, and only California law, determines property rights in this situation.

Since under applicable local law, the beneficiary had only a limited and conditional right in the spendthrift trust and income therefrom, the federal government by tax lien or levy could not change, vary or increase that limited interest. It is respectfully submitted, therefore, that the District Court erred in finding that "the right of the United States of America to collect unpaid income taxes from Richard D. Leuschner must prevail over the spendthrift provisions of the agreement of trust * * * " (R. 78-9.)

Moreover, it is equally well established that a federal tax lien and levy attaches to property only to the extent of the delinquent taxpayer's interest therein.

In *United Fidelity & Guaranty Co. v. Miller*, 143 F. Suppl. 941 (D.C. N.C. 1956) a contractor defaulted in the performance of his construction contract. The owner made a check payable to the contractor and his supplier. The contractor at first refused to endorse the check because he claimed it was insufficient. Subsequently, he endorsed it to his bonding company, which still retained the credit when the United States filed a tax lien against the contractor for unpaid unemployment, withholding and Social Security taxes. In rejecting the claim of the government and upholding the claim of the supplier to the funds, the Court said at page 944:

“Under the Internal Revenue Code, 1954, 26 U.S.C.A., § 6321, it is provided:

“‘If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.’

“This is the applicable section of the law. Under that section, nothing could be plainer than that a lien for federal taxes extends *only* to property and rights to property, real or personal, which belong to the taxpayer. The statute so provides.

“This construction has been well nigh universally placed upon like circumstances by the courts. (citing cases).” (Emphasis added.)

In the instant case, the federal government's lien and levy extended only to appellant's limited and conditional right in the income of the trust and was subject to the spendthrift provisions thereof.

In *United States v. Winnett*, 165 F. (2d) 149 (C.A. 9, 1947), Winnett borrowed money from Summer. Subsequently, Summer borrowed money from a bank and Winnett guaranteed the loan, but reserved the right to set off what he might be required to pay the bank on his guarantee against what he owed Summer. Thereafter, Summer became insolvent and the United States filed a lien against Winnett's indebtedness to Summer. In spite of that lien, Winnett paid the bank on his guarantee and claimed the right of offset. In affirming a decision allowing such offset, the Court said at page 151:

"One choosing to reach this chose-in-action belonging to Summer by attachment or garnishment could acquire no greater right against Winnett than that possessed by Summer. *This would hold true even though the sovereign initiated the proceeding.* Under §§ 3672 and 3710 (a) of the Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code §§ 3672, 3710(a), the rights of the Collector do *not* extend beyond those of the taxpayer whose right to property is sought to be levied upon.

* * *

"*The determination of what constituted the property of Summer on * * * the date of the asserted lien and priority of the United States, is primarily a matter of state law. * * * The Collector can reach nothing that Summer could not have reached.*" (Emphasis added.)

Applying the foregoing reasoning to the facts of our case, the United States, as sovereign, could acquire no greater rights in the income of the spendthrift trust than the beneficiary had. The rights of the beneficiary are a matter of state law. The United States can reach nothing that appellant could not have reached. To the extent that the income and principal of the trust were necessary for appellant's support and maintenance, appellant had no power to dispose of or alienate the same. It follows, therefore, that the United States cannot force the Trustee or beneficiary to dispose of or alienate such funds contrary to or in violation of the terms of such trust. To do otherwise would increase and change appellant's limited and conditional right in the income and corpus of the spendthrift trust.

In *United States v. Bank of United States*, 5 F. Supp. 942 (D.C. N.Y. 1934) the United States served on the bank a warrant for distraint, notice of levy and notice of tax lien against the account of one Dix, who owed the bank far in excess of the balance then in his account. The bank refused to pay the Collector any sum whatsoever. In upholding the bank's contention that by reason of its loan, there was nothing owing to the depositor, the Court referred to New York law to determine the taxpayer's property rights, and further stated at page 945:

"It is settled law, as shown by the case of *North Chicago Rolling Mill Co. v. Ore & Steel Co.*, 152 U.S. 596, 14 S. Ct. 710, 38 L. Ed. 565, that when one seeks to reach a chose in action owned by one's debtor by garnisheeing it by no-

tice to the obligor thereof, the rights of the garnisher cannot be greater than those of his debtor, i.e., the obligee of the chose in action. This was very clearly stated in the case just mentioned by Mr. Justice Jackson in 152 U.S. at page 619, 14 S. Ct. 710, 717, 38 L. Ed. 565. After discussing some English cases on the question of the rights secured by such a garnishment and quoting from the remarks of some of the Lord Justices in the case of *In re Combined Weighing & Advertising Machine Company*, 43 Chancery Division, 93, 104, 105, 106, in which the effect of a garnishment was under consideration, Mr. Justice Jackson said: 'The proposition here laid down is in harmony with the generally recognized principle that the rights of the garnisher do not rise above, or extend beyond, those of his debtor; that the garnishee shall not, by operation of the proceedings against him, be placed in any worse condition than he would have been in, had the principal debtor's claim been enforced against him directly; *that the liability, legal and equitable, of the garnishee to the principal debtor, is a measure of his liability to the attaching creditor, who takes the shoes of the principal debtor, and can assert only the rights of the latter.*'

"This seems perfectly obvious when one reflects that one has to determine what the person, whose chose in action one is seeking to garnishee, actually has.

"It would be most unfair that a third person, merely by reason of his interposition, *whether he was a sovereign or not*, should be able to change the rights inter sese between the obligor of the chose in action and his obligee, who is the objec-

tive of the levy or attachment.” (Emphasis added.)

The conclusion is inescapable that the United States could obtain, at most, only what interest appellant had in the payments due under the provisions of the spendthrift trust. The notice of levy, even by the sovereign itself, cannot change, alter or enlarge those rights. By the terms of the trust, those payments must first be used for appellant’s support and maintenance before appellant could derive any other rights therein, subject to the reach of his creditors.

Public policy has been urged as an argument by those supporting the doctrine that the funds derived from a spendthrift trust should not be exempt from a tax lien or levy imposed upon the beneficiary.

The argument is set forth in *Mercantile Trust Co. v. Hofferbert*, 58 F. Supp. 701 (D.C. Md. 1944) and cases cited therein. The foregoing case, and those relied upon therein, however, are completely distinguishable. Assuming for the purposes of argument only, but not conceding, that public policy was opposed to allowing a man who owed taxes to live in luxury on the income, or most of the income derived from a spendthrift trust, the case presented here differs materially therefrom. In the *Mercantile Trust Co.* case, *supra*, the alternative to allowing the claim of the United States for income taxes was to place all of the funds derived from the spendthrift trust beyond reach. In the *Rosenberg* case (cited therein as *In re Rosenberg’s Will*, 269 N.Y. 247, 199 N.E. 206 (1935)),

the alternative was to exempt ninety per cent of the funds derived from the spendthrift trust. Obviously, these cases present facts essentially different from those of the instant case where the only funds placed beyond the reach of the United States are those necessary for and limited to the support and maintenance of the beneficiary. Since the reasoning behind those cases has no application herein, the conclusions therein reached have no validity here.

As a matter of fact, the public policy argument actually favors appellant's position, for it is recognized in *Canfield v. Security First National Bank*, supra, that

“ * * * the protection of impecunious beneficiaries is in accord with public policy, at least to the extent of keeping such beneficiaries from becoming public charges * * * ”

Surely the State has the right to protect its own citizens and domiciliaries and keep them from its relief rolls, thereby likewise safeguarding state funds and revenue for other important purposes.

United States v. Canfield, 29 F. Supp. 734 (D.C. Cal. 1939) is not contrary. In that case the court recognized the tax lien and claim of the United States against the funds of a spendthrift trust, but there was no showing there how much of said funds was necessary for the beneficiary's support and maintenance. In the absence of such showing, we concede that all of the funds would be subject to creditors' claims. The United States would be, and in the reported *Canfield* case, supra, was in no different posi-

tion than any other creditor. In the case at bar, however, it was conceded that all of the funds payable to appellant under the terms and provisions of the spendthrift trust were reasonably necessary for his support and maintenance. (R. 167-8.)

The Tenth Amendment to the United States Constitution provides:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Under the foregoing amendment, the State has always been declared supreme in the matter of property rights.

In *United States v. Barneson*, 339 U.S. 87, 70 S. Ct. 503 (1950), the United States brought an action to declare unconstitutional California Probate Code Section 27, which prevented a California domiciliary from making an unrestricted testamentary gift to the United States, although allowing such a gift to be made to California, its counties and municipal corporations. In upholding the constitutionality thereof, the Supreme Court said at pages 91-2:

“The *Fox* case (*United States v. Fox*, 94 U.S. 315, 321, 24 L. Ed. 192) is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property, and the power to determine who may be made benefi-

ciaries. *It would be anomalous to hold that because of an amorphous doctrine of national sovereignty, federal constitutional law reached into a California statute and made impotent that State's restriction on the designation of beneficiaries.*" (Parenthetical material and emphasis added.)

Likewise, in our case, the State has reserved power to recognize limited and conditional rights in property. That is a matter of local law, and since the inception of our federal system, the cases have universally recognized the sovereignty of states over property having *situs* therein. California has recognized only a limited and conditional property right of a beneficiary in a spendthrift trust. The United States cannot, based on a doctrine of national sovereignty or federal supremacy, reach into a local matter and change, alter, modify or interfere with property rights, especially where they are based on sound considerations of state public policy.

The argument has been made that a decision in favor of the appellant will create disuniformity. That argument is completely answered in *Davis Warehouse Co. v. Bowles*, 321 U.S. 144, 64 S. Ct. 474 (1944), where the Supreme Court said at pages 155-6:

"It is also contended that an interpretation must prevail as matter of principle which will give the exemption a general and uniform operation in all states irrespective of local law. It is, of course, true that uniform operation of a federal law is a desirable end, and other things being equal, we often have interpreted statutes to

achieve it. *But in no case relied upon did we achieve uniformity at the cost of establishing overlapping authority over the same subject matter in the state and in the Federal Government. When we do at times adopt for application of federal laws within a state a rule different from that used by a state in administering its laws, the two rules may subsist without conflict, each reigning in its own realm. It is a much more serious thing to adopt a rule of construction, as we are asked to do here, which precludes the execution of state laws by state authority in a matter normally within state power. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. The custom of resorting to them to give meaning and content to federal statutes is too old and its use too diversified to permit us to say that considerations of nationwide uniformity must prevail in a particular case over our judgment that it is out of harmony with other objectives more important to the legislative purpose.*" (Emphasis added.)

It would be a serious and precedent-shattering decision to override or ignore the long line of well reasoned cases which have held that State law controls the acquisition and transmission of property, and defines the rights of its owners in relation to the state, federal government and private parties. Yet, in order to affirm the decision appealed from, this Court will be required so to do. It is respectfully

submitted that the decision of the District Court is in error and should be reversed.

II. THE CLAIM OF THE UNITED STATES AGAINST APPELLANT'S INTEREST IN THE SPENDTHRIFT TRUST WAS ASSERTED IN BANKRUPTCY PROCEEDINGS BY THE TRUSTEE IN BANKRUPTCY WHO REPRESENTED ALL OF APPELLANT'S CREDITORS INCLUDING THE UNITED STATES. THE DENIAL OF SUCH CLAIM BY THE REFEREE IN BANKRUPTCY IS A FINAL JUDGMENT AND BARS THE REASSERTION OF SUCH CLAIM IN ANY SUBSEQUENT CIVIL PROCEEDINGS.

Prior to the institution of these proceedings, the United States filed a claim in bankruptcy. This claim was entitled to priority as provided in §64 of the Bankruptcy Act. As a creditor of the bankrupt, the United States was represented by the trustee in bankruptcy. In the case of *In re Scott*, 53 F. (2d) 89 (D.C. Mich. 1931), the Court said:

"Some general considerations relative to the office of Trustee in Bankruptcy are important in the determination of the questions presented. It has long been recognized that he is an officer of the court; that he stand in a fiduciary relation to creditors; *that he represents all creditors* * * *"
(Emphasis added.)

To the same effect see:

In re Drucker, 134 F. 43 (C.A. Ky. 1905);

In re Columbia Iron Works, 142 F. 234 (D.C. Mich. 1904).

The Trustee, as the representative of all the creditors, including the United States, attempted to include

in appellant's estate in bankruptcy the assets of and income of the spendthrift trust in which appellant had an interest. The rights of the trustee were predicated on §70 of the Bankruptcy Act which provides, in part, as follows:

“Title to Property. a. The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt * * * except in so far as it is property which is held to be exempt to all * * * (5) property, including rights of action which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered * * *”

Obviously, whether the Trustee in Bankruptcy became vested with the interest of appellant as a beneficiary of the spendthrift trust herein, depended on whether such interest was transferable or could have been reached by execution or other process.

In *Allen v. Tate*, 6 F. (2d) 139 (C.A. Mo. 1925), the Trustee in Bankruptcy petitioned to review an order of the District Court, entered by the Referee in Bankruptcy, setting aside an order of sale of the bankrupt's interest in a spendthrift trust. In dismissing the petition, the Court said at page 140:

“Section 70 of the Bankruptcy Act, as amended * * * provides, among other things, that the trustee shall be invested with the title of the bankrupt to ‘property which prior to the filing of the petition he could by any means have trans-

ferred or which might have been levied upon and sold under judicial process against him.' Whether or not the estate created in the bankrupt * * * was such as would pass to the trustee under the above quoted provision depends upon whether it is such property as could be conveyed by the bankrupt or could be subjected to judicial process against her. *That matter is a question of local law as the administration of the Bankruptcy Act takes note of exemptions and rules of property in the several states. (Citing cases.)*" (Emphasis added.)

Again, in *Jones v. Harrison*, 7 F. (2d) 461 (C.A. Mo. 1925), cert. den. 270 U.S. 652, 70 L. Ed. 781, 46 S. Ct. 351, a Trustee in Bankruptcy filed a petition to sequester for the benefit of creditors the interest of the bankrupt in a spendthrift trust created by the bankrupt's father in his will. In holding that the Trustee in Bankruptcy obtained *no* interest therein, the Court said at page 466:

"The decision of the trial court is in harmony with the fundamentals of the American Rule. These are, that the testator, as the owner of his property, has a right to bestow it with such restrictions as he sees fit to impose, and that his intent cannot be subordinated to the power of the beneficiary or of his creditors."

In the case at bar, the Trustee in Bankruptcy attempted to include the interest of appellant in the spendthrift trust in appellant's bankruptcy estate, subject to administration. In his petition in bankruptcy and schedules attached thereto, appellant had

claimed his interest in said trust was exempt. The Trustee disallowed the exemption on the theory that the equitable interest of the bankrupt in the spendthrift trust was subject to seizure and levy, even though it could not have been transferred or alienated by him. The bankrupt objected to the Trustee's disallowance and on June 9, 1956, his objection was sustained by the Referee. No appeal was taken from this ruling, and it has long since become final. (Defdts. Exhibit "C", R. 178.)

The question arises, what is the effect of that ruling, and the absence of appeal therefrom?

The issue as to what rights the Trustee in Bankruptcy had in the spendthrift trust was directly presented in appellant's bankruptcy proceedings. The order that the Trustee was not entitled to the administration of appellant's interest in the spendthrift trust was based on all issues that were raised or could have been raised in such bankruptcy proceedings. In *Commissioner of Internal Revenue v. Sunnen* (1948), 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898, the Supreme Court said at page 905:

"The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon consideration of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and

received to sustain or defeat the claim or demand, *but as to any other admissible matter which might have been offered for that purpose.* (Citing cases) * * * But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered * * * In this sense *res judicata* is usually and more accurately referred to as estoppel by judgment or collateral estoppel." (Emphasis added.)

To the same effect, see:

Tait v. Western Maryland Ry. Co. (1933), 289

U.S. 620, 53 S. Ct. 706, 77 L. Ed. 1405;

Cromwell v. County of Sacramento (1876), 94

U.S. 351, 24 L. Ed. 195;

Parker v. Westover, 221 F. (2d) 603 (C.A. 9, 1955).

Clearly, the United States, by voluntarily filing a claim in the bankruptcy proceedings for the amount of appellant's unpaid income taxes, appointed the Trustee in Bankruptcy as its representative. For as a matter of law, the Trustee in bankruptcy represents all of the creditors, and all of the creditors are in privity with him, and are bound by proceedings taken or suffered by or against him. In this connection, § 70 (c) of the Bankruptcy Act provides in part, as follows:

“The trustee as to all property in the possession of, or under the control of the bankrupt at the date of the bankruptcy, or otherwise coming into the possession of the bankruptcy court, shall be deemed vested * * * with all of the rights, remedies and powers of a creditor then holding a lien therein by legal or equitable proceedings * * *, and as to all other property, the trustee shall be deemed vested * * * with all of the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied.”

Clearly, the lien or claim of the United States was no greater or different from the claim of the trustee in bankruptcy under the foregoing “strong-arm” section of the Bankruptcy Act. Nevertheless, the Referee in Bankruptcy decided that the title to the bankrupt’s interest in the spendthrift trust was not vested in the Trustee in Bankruptcy, and that the bankrupt’s limited and conditional interest under this provision was not subject to levy, seizure or sale. This decision, as we have seen, was binding on all creditors represented by the Trustee, in fact, was binding *in rem*. In *Bracewell v. Hughes*, 214 Iowa 241, 242 N.W. 66, the Court said:

“That a setting of this property as exempt by the Federal Bankruptcy Act * * * is a *final adjudication against all the world*, see *Lockwood v. Exchange Bank*, 190 U.S. 294, 47 L. Ed. 1061, 23 S. Ct. 751, 10 A.B.R. 107; *McGohan v. Anderson*, 113 F. 115, 7 A.B.R. 641; *In re Bordelon*, 4 F. (2d) 285, 5 A.B.R. N.S. 973; *In re Brown*, 228 F. 533, 35 A.B.R. 826; *Duffy v. Tegeler*, 19 F. (2d) 305, 10 A.B.R. N.S. 148.

“It must be held, therefore, as against said Trustee in Bankruptcy, and the creditors whom he represented on the date of the approval of the Trustee’s report setting off this property * * * it was finally settled as against all parties * * *”

To the same effect see:

Smalley v. Laugenour, 196 U.S. 93, 49 L. Ed. 400, 25 S. Ct. 216;

Evans v. Rounseville, 115 Ga. 684, 42 S.E. 100;

Ross v. Worsham, 65 Ga. 624;

Canada v. C. H. Beasley & Bros., 132 Va. 166, 111 S.E. 251.

Likewise, in the instant case, the decision of the Referee on the precise issue raised, that the interest of the beneficiary was not subject to levy, seizure or sale, and therefore was exempt, was binding on the United States, not only because it was a decision *in rem*, but also because the Trustee specifically represented the United States as one of the bankrupt’s creditors. The United States is therefore barred from raising the precise issue in collateral proceedings to seize the interest of the bankrupt in the spendthrift trust. There must be a finality to litigation. If the United States was dissatisfied, it could have intervened in the action, and as intervenor taken an appeal from the Referee’s decision. But the United States did not do so. Instead, the United States slept on its rights and permitted the ruling of the Referee to become final and binding upon it.

It is clear that in the absence of an appeal, a Referee’s decision is entitled to the effect of *res judi-*

cata. In *Lewith v. Irving Trust Co.*, 67 F. (2d) 855 (C.A. N.Y. 1933) the creditor filed a claim for rent in the sum of \$1000. The Trustee in Bankruptcy opposed the claim. There was a hearing before a Referee, at which time the parties stipulated that the claim might be allowed generally for \$850, and pursuant thereto, the Referee allowed the claim. Subsequently, the creditor discovered that he was entitled to priority, and petitioned for allowance of his claim in full. In denying the creditor's petition, Judge Hand said at pages 856-7:

“* * * there has been a litigation upon issues settled by the decision of a court. Such an allowance has all the substantial elements of a judgment, and has the effect of a judgment; it is res judicata between the parties not only in other suits, but in the bankruptcy proceedings themselves.” (Citing cases.)

Thus, in the instant case, the ruling of the Referee that appellant's interest in the trust was exempt, that is to say, not subject to transfer by him, levy, sale, impounding or sequestration, is res judicata between the parties and their privies, including the sovereign.

In *Breit v. Moore*, 220 F. 97 (C.A. 9, 1915) Briet filed a creditor's claim in bankruptcy for the unpaid balance for goods sold and delivered to the bankrupt. The Trustee filed objections thereto. At the hearing, the Referee found that the payments received by Breit were a preference, and refused to allow the claim until Breit returned the amount of the preference. Breit refused to do so, and the Trustee brought

an independent action against Breit. In affirming judgment for the Trustee, the Court said at page 99:

“Breit was no stranger to the proceedings before the Referee. On the contrary, he presented his claim, contested the preference alleged to have been received by him * * * and then abided by the findings and decision against him. He thus had a trial before a competent officer of his own selection of the issue he now claims the right to have tried by a jury. The conclusive answer is that he is concluded by the adverse decision of the Referee in which he acquiesced.”

So, in the case at bar, the United States filed its claim as a priority creditor. The Trustee, representing all of the creditors, including the United States, sought to take title to and possession of appellant's interest in the spendthrift trust. The Referee concluded that the trust was not subject to transfer by the bankrupt, or subject to sale, levy, impounding or sequestration, and denied the Trustee's claim. The Trustee and the United States abided by that decision. Having so acquiesced therein, the United States is concluded thereby and barred from claiming in this suit that it has a lien on appellant's interest in said trust subject to levy and seizure.

In *Hargadine-McKittrick Dry Goods Co. v. Hudson*, 122 F. 232 (C.A. 8, 1903), the plaintiff filed a claim on a judgment against the bankrupt which was disallowed. Subsequently, after the defendant had been discharged in bankruptcy, the creditor brought suit against the bankrupt alleging that its claim had been erroneously disallowed, in that it was based on

fraud and not barred by the statute of limitation, which was the basis of disallowance by the Referee. In affirming judgment for the bankrupt, the Court said at pages 233-4:

“The plaintiff having voluntarily gone into the Bankruptcy Court, and submitted itself to the jurisdiction of that court, and filed its claim against the bankrupt’s estate founded on the judgment here in suit, and the court, having disallowed the claim and entered judgment accordingly, and that judgment remaining in full force and virtue, constitutes a complete bar to this action. It is not material upon what ground the court rested its judgment. It unquestionably had jurisdiction of the parties and the subject matter, and if either party conceived its judgment was for any reason erroneous, the remedy was by appeal, and not by a suit on the same cause of action in another jurisdiction against the bankrupt.”

The facts of our case disclose that the United States voluntarily filed its claim in bankruptcy, and submitted itself to the jurisdiction of that court; that the Trustee in Bankruptcy, representing the United States, among others, sought to seize appellant’s interest in the trust. The Referee held the interest exempt. Regardless of the grounds upon which the Referee’s judgment was based, the effect thereof was to adjudicate that appellant’s interest in the trust was not subject to seizure, levy, lien, sale, impounding or sequestration. That judgment has become *final* and is binding on the Trustee and all in privity with him. If the United States or the Trustee in Bankruptcy

believed that the judgment was erroneous for any reason, the remedy was by appeal, and not be a separate suit to seize a portion of appellant's interest in the spendthrift trust, as the United States is now trying to do.

In the leading case of *Clendenning v. Red River Valley National Bank*, 12 N.D. 51, 94 N.W. 901, the bank filed a claim showing the receipt of partial payment thereon. The claim was allowed. Subsequently, the Trustee in Bankruptcy brought suit to recover the amount of the partial payments as an illegal preference, and recovered judgment thereon. On appeal, the judgment was reversed. The Court held that the allowance of the claim under bankruptcy law necessarily established that the partial payments were mutual debts and credits and not an illegal preference. The Court said at pages 903-4:

“Referees are judicial officers clothed with power to adjudicate in the first instance over the allowance or disallowance of claims presented against bankrupt's estate, and their findings are entitled to the respect and credit given to officers acting judicially * * *

“The question which the plaintiff seeks to have us determine has been judicially determined by a tribunal having jurisdiction and is therefore binding on us (citing cases). Whether the Referee intended to decide these questions is not material. As we have seen, they were necessarily involved and were, in fact, determined by his adjudication. Whether his decision was right or wrong we need not discuss. It is sufficient for the purpose of this case to say that the question has

been adjudicated by the order of allowance made by the Referee, and that the same has not been reconsidered by him or reversed by the judge upon a petition for review. If the Trustee was dissatisfied with the adjudication made by the Referee, he had a speedy remedy in Bankruptcy Court upon a petition for review, and also by an appeal from the order of the Bankruptcy Court, if adverse to him.

* * * *

“Every person submitting himself to the jurisdiction of the Bankruptcy Court in the progress of the case, for the purpose of having his rights in the estate determined, makes himself a party to the suit and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim and demands its allowance, subjects himself to the dominion of the Court, and must abide the consequences.”

In the instant case, the question which the United States seeks to have decided has already been judicially determined by the Referee in Bankruptcy. When the Referee held that appellant's interest was exempt, he incidentally and impliedly held that it was likewise not subject to levy, seizure or sale by the United States or any other creditor who had filed a claim therein. Whether that decision was right or wrong is not material now. Suffice to say, it is a final adjudication, to which the United States is bound.

In the case of *In re Sterling*, 125 F. (2d) 104 (C.A. 9, 1942), the Referee in Bankruptcy issued an injunction against Bolsa Chica from drilling on its prop-

erty adjoining the bankrupt's property on the ground that such drilling would cause irreparable injury to the bankrupt's estate. Bolsa Chica appeared and claimed the Referee had no jurisdiction to issue such injunction. Nevertheless, the injunction was issued and no appeal was taken therefrom. Subsequently, Bolsa Chica commenced drilling and was certified by the Referee to the District Court as being in contempt. Bolsa Chica moved the District Court for dismissal, which was granted. The Trustee appealed. In reversing the District Court, Judge Mathews said at page 107:

"No review of the Referee's order was sought or obtained. The time within which such review might have been sought expired long before the contempt certificate was filed. As to Bolsa Chica, therefore, the Referee's order was and is conclusive; for the principles of *res judicata* apply as well to jurisdictional questions as to other questions, as well to bankruptcy cases as to other cases, and as well to decisions of Referees as to those of Judges." (Citing cases.)

To the same effect see:

Clark v. Milens, 28 F. (2d) 457, 458 (C.A. 9 1928);

Donald v. Bankers Life Co., 107 F. (2d) 810, 812 (C.A. 5, 1939).

In *Maryland Casualty Co. v. United States*, 32 F. Supp., 746 (Ct. Cl. 1940), the plaintiff brought an action against the United States to recover income taxes paid by plaintiff as surety for the taxpayer. The plaintiff alleged that the taxpayer had been ad-

judicated a bankrupt, and that the United States had filed a claim for income taxes in the bankruptcy proceedings; that the Referee had disallowed the claim, and that no appeal had been taken. In allowing plaintiff's claim against the United States, the Court said at page 754:

“* * * Under the statute and all decisions, the judgment rendered by him (the Referee) was in effect the judgment of a court and was entitled to the same credit and standing. The judgment was not only upon the merits, but entered upon a claim presented in behalf of the United States by a party duly authorized to act for the defendant.

“It may be, as contended by defendant, that it now appears that the decision of the Referee in Bankruptcy was contrary to the actual facts in the case. But if so, there should have been an appearance for the Collector or the defendant before the Referee when the claim was heard, and evidence introduced in behalf of defendant, or at least an appeal taken from the decision. Neither the defendant nor any of its representatives did anything, although opportunity was given for a hearing, and there was nothing to prevent an appeal. Under these circumstances, the decision became final.”

Likewise, in the case at bar, the United States could have appeared at the hearing on the determination of appellant's exemptions, to protect its interest. Instead, it permitted the Trustee in Bankruptcy to appear in its behalf and represent it at all stages in those proceedings. Then, when the Referee decided

that appellant's interest was exempt and not subject to levy, sale or seizure, it was incumbent on the United States or the Trustee in Bankruptcy to seek a review thereof, or accept the full consequences of that decision. By failing to appeal or petition for review, the Trustee in Bankruptcy and the United States became bound by the decision even though it might have been wrong. The United States is now bound and concluded thereby.

In *United States v. Guaranty-Trust Co.*, 76 F. (2d) 747 (C.A. 2, 1935), the United States voluntarily appeared in a probate proceeding in which the Probate Court decided that the interest of a beneficiary in a spendthrift trust, and the income derived therefrom, were beyond the reach of a federal tax lien for unpaid income taxes. After this decision, the United States brought a suit in the federal courts for an injunction to restrain the trustees from paying any money to the beneficiary. The United States' petition for an injunction was denied, and the denial was affirmed on appeal. Circuit Judge Augustus Hand wrote the opinion and stated:

"We must * * * assume that the Government appeared in the Surrogates Court, asked that the income claimed by Rosenberg be applied in satisfaction of tax liens which it had sought to impose, and was denied relief. Under such circumstances, it is not open to us to consider whether the State Courts were right in determining that the lien claimed by the United States was precluded by an exemption granted under the New York law. This question was carefully considered by one of

the most learned and experienced judges of the State of New York and is *res judicata* as to the question raised in the present suit * * *”

Similarly, in the instant case, the United States voluntarily appeared in bankruptcy proceedings by filing its claim and presenting through the Trustee in Bankruptcy a petition to administer upon appellant's interest in the spendthrift trust. That petition was denied. Under such circumstances, it is not open to the United States District Court or to this Court to determine whether the lien now claimed by the United States was precluded by reason of exempt status or because of a limited and conditional property right in the bankrupt or for any other reason. The question has become *res judicata* and may not be raised in the present suit, and the claim of the United States Government based upon its notice of levy and demand for payment must be denied.

We respectfully submit that the claims of the United States are barred by the defense of *res judicata* and that the judgment should be reversed.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be reversed, that this Court should make its finding based upon the stipulation (R. 34) that \$750 is reasonably necessary for appellant's support, and that appellant have judgment against the First Western

Bank & Trust Company for all sums accumulating to his credit, subject to the aforesaid limitation, to wit, that it be paid for appellant's support and maintenance.

Dated, San Francisco, California,
January 18, 1958.

Respectfully submitted,

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(Appendix Follows.)

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United States
COURT OF APPEALS
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WARDE H. ERWIN and MARY LOU ERWIN,
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vs.

RALPH C. GRANQUIST, District Director of Internal
Revenue,
Appellee.

APPELLANTS' REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

FILED

NOV 14 1957

PAUL P. O'BRIEN, CLERK

WARDE H. ERWIN,
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APPELLANTS' REPLY BRIEF

*Appeal from the United States District Court for the
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TAXPAYERS' GENERAL ARGUMENT

In order to point up the positions of the parties, appellants would like to quote an imaginative statute dealing with real estate instead of income:

Section x x x:

Any person who expects within a twelve-month period to acquire real property of a value in excess of \$600.00 shall estimate the amount to be paid for said property and compute the estimated real estate

taxes to be assessed thereon and shall pay one-fourth thereof to the county treasurer each quarter, such estimate shall be made under penalty of perjury. In addition, failure to estimate within 70% of the tax as finally determined or failure to file an estimate will result in penalties being assessed based on the amount of tax as finally determined.

Would such an act be constitutional?

Would it be constitutional even if some other statute required present owners of real estate to estimate the tax and pay one-fourth in advance of assessment?

The analogy with the estimate provisions is obvious. It is a fundamental principle of taxation that no tax can be levied upon property until the property comes into existence.

This is the fundamental basis upon which appellants' arguments are premised.

THE GOVERNMENT'S GENERAL ARGUMENT

The government's argument seems to be bottomed on the premise that the Act which is questioned (Section 58) was enacted as a corollary to the withholding provisions (Br. 5).

Instead of "corollary" the Government would have more properly said that Section 58 was passed in an attempt to provide constitutional substance to the withholding provisions which would otherwise have been obviously unequal. However, whatever words are used, that was the purpose, as we lawyers are aware, and as the Government's brief finally admits.

The Government's argument is that the withholding statutes are constitutional and therefore Section 58 must also be constitutional because (in effect) it was passed to prevent a charge of unconstitutionality being made against the withholding provision for arbitrariness and lack of uniformity and of equality? (Br. 5 and 6.)

It should be clearly pointed out that the Government's statement that the withholding provisions have been held to be constitutional (Br. 4 and 5) is erroneous and is not support by the citations.

Kellems v. U. S., 97 F. Supp. 681, was decided on the sole question that the taxpayer did not have a bona-fide belief in the lack of constitutionality and hence was not in a position to raise the question. No constitutional question was determined.

Brushaber v. Union Pacific R. R., 240 U.S. 1, did not determine the constitutionality of "withholding on income not earned or not in existence" but merely held that the statutory requirements for withholding a fixed portion of interest paid on corporate indebtedness did not violate the due process clause on the ground that it cast an undue burden on the corporation. Nothing in the Act of 1913 required any "estimate of tax based on future earnings or provided penalties.

The *Brushaber* case was cited in *Fernandez v. Wiener*, 236 U.S. 340, and is authority of plaintiffs' position. It said:

"nor does a tax upon the receipt of income *which was earned* and due before the enactment of the taxing statute" (Offend due process). (Emphasis added)

No case that we have found has determined directly the constitutionality of the "withholding statutes" as they apply to the taxpayer.

While we express our serious doubts of the constitutionality of the "withholding provisions," whether they be constitutional or not can not determine the constitutionality of the "declaration of estimate provisions" and will not be argued.

We feel confident in advising the Court that the constitutionality of neither the "withholding provisions" or the "declaration of estimate provisions" has to this date been directly determined by any court.

The issue here is directed solely to the constitutionality of "declaration of estimate provisions," and these provisions are a separate and distinct enactment not depending on the "withholding provisions" in any manner.

The fallacy of the general argument of the Government is pointed out by its own brief.

For instance, on page 6, it is said:

"It is recognized that an effective administration of a pay-as-you-go tax on income which was not withheld depended upon full disclosure by a taxpayer of his estimated income for the current year."

The Court should consider carefully the language of that argument:

The statement is self contradictory. "Pay-as-you-go tax on income" supposes the existence of income measured by lapse time, while "estimated income for the current year" indicates that income is not in existence and is "guessed" or "estimated."

In addition, the following is also self-contradictory:

“depends upon *full disclosure* by a taxpayer of his *estimated* income for the *current year*.”

How can a person make a “full disclosure” of an “estimate of current year’s income?” “Income” can not be determined until it is received.” “Income” is not “income” until the passage of a fixed interval of time (App. Br. 9).

That there is no benefit to be derived from the statute itself is conceded. It provides no revenue and is not a collection procedure since there is no tax liability or assessment on the tax roles. A taxpayer computes and pays his tax for the preceding year on or before April 15 (formerly March 15) of the following year, and is obligated for the payment of the full amount of tax at that time (App. Br. 15).

The Government collects not one cent more by the so-called “declaration of estimate” in fact it becomes liable for and administratively refunds thousands of dollars of over-payments annually, an expensive and inaccurate procedure.

Since it provides no additional revenue, the sole and only benefit and justification for this statute then is that it was intended as a “constitutional crutch” to the withholding tax provisions to prevent that provision from being attacked for lack of uniformity and equality.

This was the information given to the Bar and the accountants immediately after passage of the Act. No attempt was made to enforce the provisions and generally no estimates were filed. Many years later, an at-

tempt was made to enforce the provisions only in those cases audited for other purposes and to "encourage" settlements, and no case prior to this case has been permitted to reach the court.

GOVERNMENT'S COMMENTS AS TO FOURTH AND FIFTH AMENDMENTS

The arguments of the Government regarding the "due process" and unreasonable search amendments are summarized on page 7 of its brief in the last paragraph wherein it is said:

"Certainly, an argument can not reasonably be made that a statute violates the privilege against self-incrimination merely because it requires that a taxpayer accurately and honestly state facts to his Government under penalties of perjury."

We agree that no constitutional objection for lack of due process could be made to a declaration of "fact" requirement.

The plaintiffs' objections are to the exact same effect. Anyone can be constitutionally required to make a declaration as to what the *facts* are but never *before* the *facts* come into existence.

It would be just as improper to permit the Commissioner of Internal Revenue to guess during the year what my income for that year would be and to require a payment of tax based on that guess, as to require the taxpayer to do the same thing. It makes no difference who is to do the guessing.

The Government's statements (Br. 7) that there is no violation in requiring under penalty of perjury an "accurate" and "honest" statement as to something which is not yet in existence begs the question presented here, and the statement, itself, aptly illustrates the correctness of plaintiffs' position.

How can a person make an "accurate" guess as to facts not yet in existence and by what standards is the "honesty" of that guess to be measured?

When taxpayers refused to make a "guess" under penalty of perjury, what their future income would be, they were within their constitutional rights protecting them against self-incrimination.

Plaintiffs feel that to require a disclosure under penalties of perjury of a fact not yet in existence would be a "search" and would be a violation of the "security" section of the Fifth Amendment under the principles of *Boyd v. U. S.*, 116 U.S. 616, and reaffirm the argument set forth in the opening brief.

THE TAX POWER OF CONGRESS

On page 8 of the Government's brief, is discussed a contention that the due process clause is not violated because (in effect) the statute is a "tax statute," and tax statutes can not be unconstitutional unless they exert a forbidden power or confiscation of property.

Here we have difficulty in following the Government's contention.

This argument requires a determination of whether or not this statute is a "tax measure," and the Government contends both that it is (p. 8) and that it is not (p. 9).

The present statute is not a "levy." It is a payment in advance based upon what the taxpayers' guessed future income and guessed tax based on the guessed income might turn out to be with a penalty for perjury for failure to guess correctly.

It is not a "collection" of tax because no assessment is on the tax roles when the payment is required.

As quoted from defendant's brief (Br. 8-9) this case presents:

"The rare and special instance which compels the conclusion that the statute does not involve the exertion of the tax power."

Government's brief itself reflects the contradiction when talking about the estimate provisions as a "tax measure" (Br. 8), and at the same time trying to construe the measure as a "tax which isn't a tax?"

On page 9 of its brief, it states:

"Section 58 does not impose either kind of tax (property or capitation). It merely requires the filing of a return stating what the estimated tax will be. Neither of these sections levies a tax which can be called a direct tax. The statutory scheme makes it plain that what was intended, and what was accomplished, was to place taxpayers on a current pay-as-you-go basis."

Pay-as-you-go on what?

By the Government's own brief, it is not a tax so it couldn't be a pay-as-you-go tax because nothing has come into existence to tax.

The statute is clearly a pay-as-you-go "guess" subject to penalties for guessing wrong.

A further illustration is the Government's statement. (Br. bot. 9) states that:

"Certainly, the requirement of paying tax concurrently with earned income can not convert a constitutional tax into an unconstitutional direct tax."

Here, the Government contends this is a tax on "income." The Court will remember that the income tax is a "direct tax" and required the constitutional amendment to permit the levy without apportionment. *Brushaber v. U. S.*, 240 U.S. at 19 (also see p. 16 et seq.), explaining *Pollack v. Farmers Loan & Trust Co.*, supra. Defendant's statement (Br. 9) that section 58 does not impose a direct tax because it is not a tax on property is incorrect (if it is a tax on income as the government states). Such a statement is directly contrary to the direct holding of *Pollack* and *Brushaber* cases which hold that income is property and the tax is direct.

However, if as the Government concedes:

"neither of these sections levies a tax which can be called a direct tax"

then it must be conceded that Section 58 is not a tax on income (because the income tax is a direct tax) but it can not be denied that if it is a tax of some kind, it is a direct tax on the individual or his property and it must therefore be apportioned (*Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429).

The Government can not ride both horses at the same time at least not for longer than the ten odd years it has taken to finally get a case into the court for determination.

Let's get down to facts. If it is an income tax as the Government contends, then let's find out where the "income" is that it attempts to tax. If it is any other kind of tax, then why isn't it apportioned? If it isn't any kind of a tax then where are the standards by which its definiteness and certainty required by due process are to be measured? If what the Government is trying to say is that Section 58 is not an income tax because the income on which it is to be based is not in existence, we agree and we are right back to the fundamental question. Can a person be constitutionally required to estimate future income under penalty of perjury?

CONCLUSION

The cases of *Porth v. Broderick*, 241 F.2d 925 (CA 10th) and *Walker v. U. S.*, 240 F.2d 60 (CA 5th), are cited for the proposition that Section 58 and the penalty sections 294 (d) (1) (A) have been held constitutional.

This is not correct—*Porth v. Broderick* was an attempt to declare the 16th Amendment to be unconstitutional. The court held contrary to the taxpayer's contention.

Walker v. U. S., 240 F.2d 601, was a case in which the plaintiff here filed a brief amicus curiae.

In refusing to consent to the filing by plaintiffs of a

brief amicus curiae in the Walker case, Mr. Charles K. Rice by Lee A. Jackson (both counsel in this case) advised the Fifth Circuit by letter under the date of September 28, 1956, as follows:

“ . . . we call to your attention the fact that the motion (to file a brief amicus curiae) indicates that the amicus brief will present upon appeal for the first time an issue which was not raised in the District Court, namely whether Section 58 of the 1939 Code is a valid provision.”

The Government's contention in the Walker case was that the taxpayer questioned only the validity of the “penalty provisions” (Section 294 (d) (1) (A) and not the “declaration of estimate” provisions (Section 58) and that the court should not therefore consider the constitutionality of Section 58.

The Court followed the Government's theory and held:

“The question presented by the appeal is whether the statute (294 (d) (1) (A)) providing for additions to tax where a taxpayer fails through willful neglect to make or file a declaration of estimated tax is constitutional.”

Fifth Circuit therefore avoided the constitutional question as to Section 58 and said:

“Appellants do not attack directly the statutory requirement that estimates be filed; and it is difficult to perceive any sound reason why Congress should not have possessed the power to lay this duty upon taxpayers as a reasonable constituent of ascertaining the amount of taxes to be assessed.”

The gratuitous dicta is of course erroneous insofar as it assumed Section 58 is a “constituent of ascertaining

the amount of taxes to be assessed.” The Government itself concedes, as it must, that the purpose of Section 58 was not a step in any determination of ultimate tax. In fact, they contend it was an attempt to collect a tax before such a tax was due.

We think it unfortunate that the Justices of the Fifth Circuit were not better informed of the purposes and effect of the legislation, because although the statement is dicta such statements sometimes (as in the present case) are cited for a proposition which is obviously incorrect.

Mr. Walker (a Texas lawyer) in his petition for rehearing quoted the above language (in full) and asked the Court to make a finding directly on the constitutionality of Section 58. The petition for rehearing was denied.

The case of *Beacham v. Commission*, 28 T.C. 67 (on appeal to the 5th Circuit) was decided on exactly the same basis as Walker. Taxpayers only questioned the penalty provisions 294 (d) (1) (A) and 294 (d) (2) as violative of the due process clause.

This Court then is the only Court in which the question has successfully been directly presented and presents to this Court a matter of first impression.

The other cases cited as construing similar statutory provisions have not upheld any constitutionally similar matter—contrary to the conclusion of defendant’s brief.

Abney v. Campbell, 206 F.2d 836, did not involve a taxpayer and raised only the question of “involuntary servitude” in collecting taxes for the Government.

Cain v. U. S., 211 F.2d 375, involved a self-employment tax which is a Social Security measure and is not a "tax" at all.

Kellems v. U. S. (supra) has already been discussed and the constitutionality was not determined at all and was decided on the ground that the question was improperly raised.

The remaining decisions cited did not discuss the constitutional question involved here and are not helpful to the Court.

This matter is presented to the Court in the sincere belief that any person, judge, lawyer or layman, having taken the oath to *support and defend* the constitution of the United States can not ignore the obvious challenge presented in this case.

No lawyer as an officer of this Court having taken such oath and after successfully and repeatedly defending clients against imposition of such an obviously unconstitutional provision could properly yield when the challenge is flung in his direction.

It is the Bench and Bar on trial in this case.

We submit the matter to the Court's "honest" and "fearless" and independent determination of an important issue:

Is Section 58 constitutional?

Respectfully submitted,

WARDE H. ERWIN, in propria personam
and attorney for Mary Lou Erwin.

No. 15620

United States
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Appellants

v.

RALPH C. GRANQUIST, District Director of Internal
Revenue,
Appellee

*On Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF FOR THE APPELLEE

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Appellee

*On Appeal from the Judgment of the United States
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BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court did not write an opinion. Its findings of fact and Conclusions of law (R. 9) are not officially reported.

JURISDICTION

This appeal involves additions to tax for failure to file a declaration of estimated tax for the year 1952. The additions to tax assessed by the Commissioner of In-

ternal Revenue were paid on June 14, 1955. (R. 7.) A claim for refund was filed by taxpayers on March 6, 1956. (R. 8.) On September 14, 1956, after more than six months had elapsed from the filing of the claim for refund the taxpayers, in accordance with the provisions of Section 3772, Internal Revenue Code of 1939, filed their complaint in the District Court. (R. 3-6.) Jurisdiction was conferred upon the District Court by 28 U. S. C., Section 1340. Judgment was entered by the District Court on May 10, 1957. (R. 10.) An order denying motions filed by the taxpayers to amend the judgment and to substitute other findings of fact was thereafter entered. (R. 13.) On June 5, 1957, within sixty days of the entry of the final judgment and order on May 10, 1957, a notice of appeal was filed (R. 13-14.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

The only question presented is whether Section 58 of the Internal Revenue Code of 1939, which for the year in issue required the filing of a declaration of estimated tax by the taxpayer on or before March 15, 1952, is constitutional.

STATUTES INVOLVED

The pertinent statutes involved are set forth in the Appendix, *infra*.

STATEMENT

On May 9, 1955, the Commissioner of Internal Revenue assessed taxes of \$307.66, additions to tax in the amount of \$171 and interest of \$40.15. (R. 7.) The assessment of the additions to tax was based in part on the taxpayers' failure to file a declaration of and pay an estimated tax during the year 1952. (R. 5-6.) The only contention made by taxpayers with respect to this addition to tax was that Section 58 of the Internal Revenue Code of 1939, which requires the filing of a declaration of estimated tax is unconstitutional and void. (R. 8.) The District Court resolved this issue against the taxpayers holding that Section 58 "is constitutional as a valid exercise of the taxing power accorded the Congress under the Constitution". (R. 9.)

SUMMARY OF ARGUMENT

Neither Section 58 of the Internal Revenue Code of 1939, which requires a taxpayer to file a declaration of his estimated income for the current year and to make quarterly payment of his income tax as the income is earned, nor Section 294(d)(1)(A), which provides for an addition to tax for wilful failure to file a declaration or to make the quarterly payments, constitutes an arbitrary exercise by Congress of its power to tax.

Section 58 is a part of the Congressional plan to put taxpayers on a pay-as-you-go basis and was intended to supplement the withholding provisions of the Code by requiring current payment of tax on that income which

could not as a practical matter be subjected to withholding at the source. The withholding provisions of the Code have been held to be constitutional and Section 58 is constitutional as a necessary corollary of those provisions. The Courts of Appeals for the Tenth and the Fifth Circuits have held Section 58 to be a constitutional exercise of Congress' power to tax. The District Court in agreeing with these courts has reached a correct result and, accordingly, should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE PROVISIONS OF SECTION 58 OF THE INTERNAL REVENUE CODE OF 1939, REQUIRING THE FILING OF A DECLARATION OF ESTIMATED TAX ARE CONSTITUTIONAL.

The only issue presented in this appeal is whether Section 58 of the Internal Revenue Code of 1939, Appendix, *infra*, which, in the instant case, required that the taxpayers file a declaration of estimated tax on or before March 15, 1952, is constitutional. An addition to tax for failure to file such a declaration is mandatory unless such failure is shown to have been due to reasonable cause and not to wilful neglect. Section 294(d)(1)(A), Internal Revenue Code of 1939, Appendix, *infra*. The taxpayers in the instant case have not contended that they were not required by the statute to file a declaration or that their failure to file the required declaration was due to reasonable cause; instead, they contend only that Section 58 is unconstitutional. The District Court held, contrary to the taxpayers' contentions, that Section 58 was a valid exercise of the taxing

power conferred upon Congress by the Constitution and, accordingly, did not allow taxpayers a refund of the assessed addition to tax. In so doing, we submit the District Court was correct and should be affirmed.

It is clear, we submit, that neither Section 58, requiring a declaration of estimated tax, nor Section 294 (d)(1)(A), providing for an addition to tax for an unreasonable failure to file a deduction, represents an arbitrary encroachment by Congress upon any power forbidden to it. Section 58 of the 1939 Code was rewritten by Section 5(a) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, as part of the plan adopted in that year to have income tax collections placed on a pay-as-you-go basis. That statute contemplated that taxpayers would have their tax withheld as they earned wages, and that the tax would be paid currently to the Collector. The power to collect a tax on income by a withholding procedure at the source of the income as it is earned cannot be questioned. *Brushaber v. Union Pacific R. R.*, 240 U. S. 1; *Kellems v. United States*, 97 F. Supp. 681 (Conn.) However, since Congress found that it was impossible to apply the withholding provisions to other forms of income, Section 58 was enacted as a corollary to the withholding provisions. It was intended to place taxpayers who earned income on which tax would not be withheld on a pay-as-you-go basis by means of having these taxpayers estimate their tax for the current year and to pay such estimated tax within the year in four equal quarterly installments. To assist the Commissioner in administering these provisions,

Congress considered it necessary to require taxpayers to estimate their income in advance for the current year and to prepare and file a declaration of their estimated tax. See H. Rep. No. 401, 78th Cong., 1st Sess., pp. 11-13, 32-39 (1943 Cum. Bull. 1283, 1290-1291, 1307-1312); S. Rep. No. 221, 78th Cong., 1st Sess., pp. 8-10, 35-43 (1943 Cum. Bull. 1314, 1319-1321, 1340-1346); H. Conference Rep. No. 510, 78th Cong., 1st Sess., pp. 49-59 (1943 Cum. Bull. 1351, 1367-1374).

It is basic that, where Congress has the power to enact certain legislation, it can implement such legislation by other provisions. Article I, Section 8, of the Constitution of the United States; *McCulloch v. Maryland*, 4 Wheat. 316, 428. In this instance, Section 58 was a valid exercise by Congress of its taxing power, as being necessary to the exercise of its constitutional power to collect a tax on income as it is earned. And Section 294(d)(1)(A) was a proper implementation of Section 58. Congress has broad discretion in establishing procedures by which its tax exactions may be made effective. *Steward Machine Co. v. Davis*, 301 U. S. 548; *Helvering v. Davis*, 301 U. S. 619. It recognized that an effective administration of a pay-as-you-go tax on income which was not withheld depended upon full disclosure by a taxpayer of his estimated income for the current year. If no disclosure were made it would be difficult for the Commissioner to collect currently the tax on such income. Consequently, Section 294(d)(1)(A) was enacted to insure, among other things, that a taxpayer would file a declaration of his estimated tax by providing for an addition to tax for failure to file such a declaration.

H. Rep. No. 401, *supra*; S. Rep. No. 221, *supra*; H. Conference Rep. No. 510, *supra*.

The taxpayers' contentions that Section 58 is unconstitutional rest in large part on the proposition that the taxpayer must make a "guess" (Br. 15.) as to what his income for the year will be. Thus, taxpayers argue that since they are required to estimate their income for the year under penalties of perjury, the statute contravenes the privilege against self-incrimination contained in the Fifth Amendment to the Constitution (Br. 14-15) and is also a violation of the right guaranteed by the Fourth Amendment to be free from an unreasonable search and seizure.

There is no merit whatever in such contentions. The taxpayers have not pointed to any authority which warrants the speculation that an honest, even though inaccurate, estimation of their income would lead to a prosecution for perjury. Indeed, Section 58(d)(2) provides a procedure for amendment of a declaration at various times during the year so that the estimate can be made to conform with the facts as they develop. And, further, no addition to tax for substantial underestimation of the tax is permitted if the estimation is based upon facts existing during the preceding years. Section 294(d)(2).

Certainly, an argument cannot reasonably be made that a statute violates the privilege against self-incrimination merely because it requires that a taxpayer accurately and honestly state *facts* to his Government under penalties of perjury. Nor can Section 58 reasonably be considered to be in violation of the Fourth Amendment

to the Constitution. There is no relationship whatever between the requirement of furnishing information to the Government and the prohibition against unreasonable search and seizure.*

Neither is there any merit in taxpayers' argument that Section 58 contravenes the due process requirements of the Fifth Amendment because it lacks certainty. In other cases in which taxpayers have complained that certain provisions of tax statutes violate the due process clause of the Fifth Amendment, the Supreme Court and the various Courts of Appeals have repeatedly reaffirmed the basic doctrine that the Government's power to levy and collect taxes should not be crippled, and that the due process clause is not a limitation upon the taxing powers of Congress, except in the rare and special instances where the tax statute "be so arbitrary as to compel the conclusion that it does not involve an exertion of the tax power, but constitutes, in substance

* *Boyd v. United States*, 116 U. S. 616, cited by taxpayers (Br. 15) is not applicable. That case held (pp. 634-635) that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit [a suit for forfeiture or penalty] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment." The instant statute does not require a compulsory production of books and records; it merely requires a return declaring what a taxpayer estimates his income will be for a particular year. The requirement of such a return does not violate the privilege against self-incrimination or the right to be free from unreasonable search and seizure. In this respect, it is similar to the requirement of filing the final income tax return. See *United States v. Sullivan*, 274 U. S. 259.

and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Magnano Co. v. Hamilton*, 292 U. S. 40, 44; *Foley Securities Corp. v. Commissioner*, 106 F. 2d 731, 735-737 (C. A. 8th); *Davis v. United States*, 87 F. 2d 323 (C. A. 2d), certiorari denied, 301 U. S. 704, rehearing denied, 302 U. S. 773; *Brushaber v. Union Pac. R. R.*, *supra*; *McCray v. United States*, 195 U. S. 27. Cf. *Kitagawa v. Shipman*, 54 F. 2d 313 (C. A. 9th).

As we have pointed out above, since the requirement of filing declarations of estimated tax is a necessary corollary to withholding provisions of the tax law (which have been held constitutional), there can be no serious argument made that Section 58 is an arbitrary exercise of Congressional power.

Neither does Section 58 impose a direct tax which, under the Constitution, must be apportioned. A direct tax is a tax on property or a capitation tax. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429. Section 58 does not impose either kind of tax. It merely requires the filing of a return stating what the estimated tax for the year will be; Section 59 of the Internal Revenue Code of 1939, Appendix, *infra*, provides for the time for payment of the estimated tax. Neither of these sections levies a tax which can be called a direct tax. The statutory scheme makes it plain that what was intended, and what was accomplished, was to place taxpayers on a current pay-as-you-go basis. The amounts paid as estimated tax are considered payment of the tax for the year involved. Section 59(d). Certainly, the requirement of paying tax concurrently with earning the income can-

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not convert a constitutional income tax into an unconstitutional direct tax. Where an Act of Congress is claimed to be unconstitutional a presumption exists in favor of its validity, and it is only where the question is free from any reasonable doubt that a court should hold an Act to be in violation of the Constitution. *Nicol v. Ames*, 173 U. S. 509, 514-515; *Brown v. Maryland*, 12 Wheat. 419, 436. With respect to Congress' power to enact a tax, the Supreme Court has stated in *Brushaber v. Union Pac. R. R.*, *supra*, p. 12:

That the authority conferred upon Congress by Sec. 8 of Article I

“to lay and collect taxes, duties, impost and excises” is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine.

The constitutionality of Sections 58 and 294(d) (1)(A) has already been upheld by two Courts of Appeals. See *Porth v. Brodrick*, 214 F. 2d 925 (C. A. 10th); *Walker v. United States*, 240 F. 2d 601 (C. A. 5th), certiorari denied, 354 U. S. 939. See also *Beacham v. Commissioner*, 28 T. C. No. 67. (on appeal, C. A. 5th).

Other provisions of the Current Tax Payment Act of 1943 requiring employers to withhold tax on salaries paid to their employees as well as similar withholding provisions relating to withholding of social security tax or the tax on self-employment income have also been held to be constitutional. *Abney v. Campbell*, 206 F. 2d 836 (C. A. 5th), certiorari denied, 346 U. S. 924; *Cain v. United States*, 211 F. 2d 375 (C. A. 5th); *Kellems v.*

United States, supra. In addition, the constitutionality of the provisions under attack here has been assumed in cases imposing additions to tax for failure to file a declaration of estimated tax. See e.g. *Stephan v. Commissioner*, 197 F. 2d 712 (C. A. 5th); *Coates v. Commissioner*, 234 F. 2d 459 (C. A. 8th); *Clayton v. Commissioner*, decided January 25, 1956 (1956 P-H. T. C. Memorandum Decisions par. 56,021), affirmed, 245 F. 2d 238 (C. A. 6th).

Mr. Erwin, the taxpayer in the instant case, filed a brief as *amicus curiae* in the *Walker* case and presented the same arguments which are now made to this Court. The Fifth Circuit, however, rejected those contentions, upheld the addition to tax for failing to file a declaration of estimated tax and stated (240 F. 2d 601, 602):

* * * it is difficult to perceive any sound reason why Congress should not have possessed the power to lay this duty [i.e. to file a declaration of estimated tax] upon taxpayers as a reasonable constituent of the mechanics of ascertaining the amount of taxes to be assessed.

In the circumstances, we submit there are no real doubts concerning the constitutionality of Section 58 of the 1939 Code. In so holding, the District Court was correct.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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October, 1957

APPENDIX

Internal Revenue Code of 1939:

SEC. 58 [As amended by Section 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; Section 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; Section 208(d)(4), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; and Section 221(g) Revenue Act of 1950, c. 994, 64 Stat. 906]. DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) *Requirement of Declaration.*—Every individual (other than an estate or trust and other than a non-resident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable, but including every alien individual who is a resident of Puerto Rico during the entire taxable year) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of \$4,500 plus \$600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed \$100 for the taxable year and his gross income to be \$600 or more.

(b) *Contents of Declaration.*—In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source and without regard to the tax imposed by subchapter E on self-employment income;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

(c) *Joint Declaration by Husband and Wife.*—In the case of a husband and wife, a single declaration under this section may be made by them jointly, in which case the liability with respect to the estimated tax shall be joint and several. No joint declaration may be made if either the husband or wife is a nonresident alien. If a joint declaration is made but a joint return is not made for the taxable year, the estimated tax for such year may be treated as the estimated tax of either the husband or the wife, or may be divided between them.

(d) *Time and Place for Filing.*—

(1) *In General.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

(2) *Amendment of Declaration.*—An individual may make amendments of a declaration filed during

the taxable year under this subsection, under regulations prescribed by the Commissioner with the approval of the Secretary. If so made, such amendments may be filed on or before the fifteenth day of the last month of any quarter of the taxable year subsequent to that in which the declaration was filed and in which no previous amendment has been filed, except that in the case of an amendment filed after September 15 of the taxable year, it may be filed on or before January 15 of the succeeding taxable year. Declarations and amendments thereof shall be filed with the collector specified in section 53(b)(1).

(3) *Return as Declaration or Amendment.*—If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

(e) *Extension of Time.*—The Commissioner may grant a reasonable extension of the time for filing declarations and paying the estimated tax, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(f) *Persons Under Disability*.—If the taxpayer is unable to make his own declaration, the declaration shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(g) *Signatures Presumed Correct*.—The fact that an individual's name is signed to a filed declaration shall be prima facie evidence for all purposes that the declaration was actually signed by him.

(h) *Publicity of Declaration*.—For the purposes of section 55 (relating to publicity of returns), a declaration of estimated tax shall be held and considered a return under this chapter.

(26 U. S. C. 1952 ed., Sec. 58)

SEC. 59 *supra* [As amended by Section 13(a), Individual Income Tax Act of 1944]. PAYMENT OF ESTIMATED TAX.

(a) *In General*.—The estimated tax shall be paid as follows:

(1) If the declaration is filed on or before March 15 of the taxable year, the estimated tax shall be paid in four equal installments. The first installment shall be paid at the time of the filing of the declaration, the second and third on June 15 and September 15, respectively, of the taxable year, and the fourth on January 15 of the succeeding taxable year.

(2) If the declaration is filed after March 15 and not after June 15 of the taxable year, and is not required by section 58(d) to be filed on or before March 15 of the taxable year, the estimated tax shall be paid in three equal installments. The first installment shall be paid at the time of the filing of the declaration, the second on September 15 of the taxable year, and the third on January 15 of the succeeding taxable year.

(3) If the declaration is filed after June 15 and not after September 15 of the taxable year, it is not

required by section 58(d) to be filed on or before June 15 of the taxable year, the estimated tax shall be paid in two equal installments. The first installment shall be paid at the time of the filing of the declaration, and the second on January 15, of the succeeding taxable year.

(4) If the declaration is filed after September 15 of the taxable year, and is not required by section 58(d) to be filed on or before September 15 of the taxable year, the estimated tax shall be paid in full at the time of the filing of the declaration.

(5) If the declaration is filed after the time prescribed in section 58(d) (including cases in which an extension of time for filing the declaration has been granted under section 58(e)), paragraphs (2), (3), and (4) of this subsection shall not apply, and there shall be paid at the time of such filing all installments of estimated tax which would have been payable on or before such time if the declaration had been filed within the time prescribed in section 58(d), and the remaining installments shall be paid at the times at which, and in the amounts in which, they would have been payable if the declaration had been so filed.

(b) *Amendments of Declaration.*—If any amendment of a declaration is filed, the remaining installments, if any, shall be ratably increased or decreased, as the case may be, to reflect the increase or decrease, as the case may be, in the estimated tax by reason of such amendment, and if any amendment is made after September 15 of the taxable year, any increase in the estimated tax by reason thereof shall be paid at the time of making such amendment.

(c) *Installments Paid in Advance.*—At the election of the individual, any installment of the estimated tax may be paid prior to the date prescribed for its payment.

(d) *Payment as Part of Tax for Taxable Year.*—Payment of the estimated tax, or any installment thereof, shall be considered payment on account of the tax for

the taxable year. Assessment in respect of the estimated tax shall be limited to the amount paid.
(26 U. S. C. 1952 ed., Sec. 59)

SEC. 294 [As amended by Section 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21, Sections 6(b), (8), and 13(b) of the Individual Income Tax Act of 1944, *supra*, Section 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; and Section 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452].

* * * * *

(d) *Income Tax.*—

(1) *Failure to File Declaration or Pay Installment of Estimated Tax.*—

(A) *Failure to file declaration.*—In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

(B) *Failure to pay installments of estimated tax declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed or where a declaration of estimated tax has been made and filed after the time prescribed

and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall *be added to the tax 5 per centum of the unpaid amount* of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial Underestimate of Estimated Tax.*

—If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or 66 $\frac{2}{3}$ per centum of such tax so determined in the case of such farmers, *exceeds the estimated tax* (increased by such credits), there shall be added to the tax an amount equal to such excess, *or equal to 5 per centum* of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for

dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the 80 per centum and 66 $\frac{2}{3}$ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

(26 U. S. C. 1952 ed., Sec. 294)

United States
COURT OF APPEALS
for the Ninth Circuit

WARDE H. ERWIN and MARY LOU ERWIN,
Appellants,
vs.

RALPH C. GRANQUIST, District Director of Internal
Revenue,
Appellee.

APPELLANTS' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

FILED

SEP 19 1957

PAUL R. STEVENS, CLERK

WARDE H. ERWIN,
*in propria personam and attorney for appellant Mary Lou
Erwin.*

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District of Oregon.*

**STATEMENT OF PLEADINGS AND FACTS DISCLOSING
BASIS OF JURISDICTION OF DISTRICT COURT
AND THIS COURT**

FACTS

Plaintiffs were assessed by the Commissioner of Internal Revenue penalties for

- 1) Substantially underestimating their income tax for the tax year 1952 and
- 2) Failing to file a declaration of estimated income tax for the tax year 1952 (R. 4, 5 and 6).

Plaintiffs paid the assessments and filed a claim for refund of both penalties on the ground that the statute imposing a duty to estimate future income and the amount of future tax which might be due on such estimate, and providing penalties for failure to estimate correctly were unconstitutional (R. 7 and 8).

The claim was neither allowed or denied for a period in excess of six months and this suit was instituted against the collector to whom the tax was paid (R. 8).

Jurisdiction of the District Court was invoked under Title 28 USC, Section 1340 (Congressional Act of June 25, 1948, C 646, 62 Stat. 932) (R. 7).

The court held that the statute, requiring the filing of declaration of estimated tax was constitutional and entered findings of fact, conclusions of law and judgment accordingly (R. 9, 10).

Judgment was in favor of appellants for the amount of the penalty assessed for "substantially underestimating the income tax on the year in question" (R. 10). However, the basis for that holding was that the penalty for "substantial underestimation" could not be asserted when the penalty for "failure to file" was also asserted since the two penalties were inconsistent (Finding # 3 not printed—original form).

Plaintiffs filed a notice of appeal and undertaking on appeal within the time allowed (R. 13).

Jurisdiction of this Court is based on Title 28 USC, Sec. 1291 (Congressional Act of June 25, 1948, C 646, 62 Stat. 929).

STATEMENT OF THE CASE

The action was brought primarily to test the constitutionality of Section 58, Title 26 USC (Internal Revenue Code of 1939) which requires an estimate of future income not yet received, and requires an estimate of future tax not yet due or assessed under penalty of perjury, and Section 294, Title 26 USC (Internal Revenue Code, 1939) providing penalties for failure to estimate correctly.

The question was raised in several ways and is presented here by separate assignments of error.

1. The overruling (R. 13) of appellants' objections to Conclusion of Law 2 (R. 11) (Objection II).

Conclusion of Law # 2 reads as follows:

"Section 58 of the Internal Revenue Code of 1939, which for the year in suit required the filing of a declaration of estimated tax by a taxpayer on or before March 15, 1952 is constitutional as a valid exercise of the taxing power accorded Congress under the Constitution."

2. The overruling (R. 13) of plaintiffs' motion to substitute the findings of fact and conclusions of law (R. 11) reading as follows:

"I. That plaintiffs request that a finding be made and entered herein to reflect that plaintiffs intend that penalties may not be asserted for either failure to file a declaration of estimated tax or for substantial underestimate of estimated tax."

"II. Plaintiffs request that a Conclusion of Law enter herein that Section 58 of the Internal Revenue Code of 1939 is unconstitutional and void."

"III. Plaintiffs request that a conclusion of law enter herein that neither the penalty for substan-

tially underestimate of estimated tax under Section 294 (d) (2) of the Internal Revenue Code of 1939 nor the penalty for failure to file an estimate under Section 294 (d) (1) (A) of the Internal Revenue Code of 1939 may be assessed and therefore neither are appropriate."

3. The overruling (R. 13) of plaintiffs' motion to amend the Judgment Order of May 10, 1957, to read as follows (R. 12 and 13):

"Adjudged, Ordered and Decreed, that the plaintiffs recover of the defendant the sum of \$68.40, together with interest as provided by law plus the additional sum of \$102.60 together with interest as provided by law on the ground and for the reason that Section 58 of the Internal Revenue Code of 1939 which for the year involved in this suit required the filing of a Declaration of Estimated tax by taxpayer on or before March 15, 1952, is unconstitutional and void, therefore making the assessment of any penalty for failure to file a declaration (or) for a substantial underestimate of a declaration is also unconstitutional and void."

Plaintiffs-appellants filed their notice of appeal (R. 13 and 14) appealing from (1) the judgment and order of May 10, (2) the order denying plaintiffs' motion to amend the judgment, (3) the Order denying plaintiffs' objections to Findings of Fact and Conclusions of law, (4) and the order denying plaintiffs' motion to substitute findings and conclusions.

SPECIFICATION OF ERRORS RELIED UPON

1. Error in overruling plaintiffs' objections to conclusions of law # 2.

The conclusion was that Section 58, Title 26 USC (1939 IRC) was constitutional (R. 9). Plain-

tiffs objected (R. 11). The objection was denied (R. 13).

2. Error in overruling plaintiffs' motion to substitute findings of fact.

(Waived as unessential to a determination of the question.)

3. Error in overruling plaintiffs' motion to substitute a Conclusion of Law, II.

The requested conclusion was that Section 58, Title 26, USC (1939 IRC) was unconstitutional (R. 11). The request was denied (R. 13).

4. Error in overruling plaintiffs' motion to substitute a Conclusion of Law, III.

The requested conclusion was that neither the penalty provided by Section 294 (d) (2), Title 26 USC (1939 IRC) nor the penalty provided by Section 294 (d) (1) (A), Title 26 USC (1939 IRC) may be assessed and are not appropriate (R. 11 and 12).

The request was denied (R. 13).

5. Error in overruling plaintiffs' motion to amend the judgment.

The amendment requested (R. 12-13) was to the effect that the judgment should find that Section 58, Title 26 USC (1939 IRC) and the penalty provisions based thereon ["failure to file" an estimate, Section 294 (d) (1) (A) Title 26, and Section 294 (d) (2), Title 26 USC (1939 IRC)] to be unconstitutional and void and to provide for a judgment in favor of plaintiffs in the amount of the two penalties (\$171.00).

The motion was denied (R. 13).

Each of the foregoing specifications was intended to present one basic question, and error is claimed as to each specification in that the court failed to find that Section 58, Title 26 USC (1939 IRC), and the penalty provisions, Section 294 (d) (1) (A) and (d) (2), Title 26 USC (1939 IRC) to be unconstitutional.

In the interest of brevity the constitutional questions will be argued without specific reference to each specification.

SUMMARY OF ARGUMENT

Article I and the 16th Amendment

Article I, Section 9, paragraph 4 of the Constitution of the United States provides:

"No capitalization or other direct tax shall be had, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The Sixteenth Amendment to the Constitution of the United States removed the constitutional requirement of "apportionment" as applied to a tax on "income."

The Sixteenth amendment gives Congress the power to determine what shall be "income" and that they have determined this to be the amount earned in any 12-month period less allowable deductions.

Section 58, Title 26 USC (1939 IRC) taxes something besides income because it requires a payment of a tax on income in advance of the time the income comes into existence.

Since Section 58 is not a tax on income but is a tax based on what the taxpayer's guess as to what his income will be, it does not come under the 16th Amendment and must be capitalization tax or a direct tax. If Section 58 is a tax measure, the tax is not apportioned as required by Article I, Section 9 of the Constitution and is void.

Fifth Amendment

The Fifth Amendment to the Constitution of the United States provides that no person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law. . . .

No "due" process or "any process" of law is provided by a statute which attempts to require a person to "guess" what his income is going to be in advance of receiving it and to "guess" what the tax on the "guessed income" will be.

A statute which further requires that the "guess" be made under *penalty of perjury* and which further provides that the "guesser" will be assessed a penalty if he guesses wrong or fails to guess at all based upon what his income turns out to be 12 months later, is in violation of the "self incrimination clause" of the Fifth Amendment and the unreasonable search and seizure provisions of the Fourth Amendment. This will be referred to in this brief as "statutory self incrimination."

Fourth Amendment

The Fourth Amendment provides that the right of the people to be secure in their own person . . . and effects

against unreasonable searches and seizures shall not be violated.

The result of Section 58 is to render "insecure" the "person" and "effects" of a citizen. The self-imposed "search" is "unreasonable" in that Congress recovers the tax on the "guessed income" after it becomes due in any event.

ARGUMENT

§ 58 Declaration of Estimated Tax by individuals:

"(a) Requirements of Declaration—every individual . . . should at the time prescribed in subsection (d) make a declaration of his estimated tax for the taxable year if.

"(1) his gross income from wages (as defined in Section 1621) can reasonably be expected to exceed the sum of \$4500.00 plus \$600.00 with respect to each exemption provided in Section 25 (b); or

"(2) his gross income from sources other than wages (as defined in Section 1621) can reasonably be expected to exceed \$100.00 for the taxable year and his gross income to be \$600.00 or more.

"(b) Contents of Declaration. In the declaration required under subsection (a), the individual shall state—

"(1) The amount which he estimates as the amount of tax under this chapter for the taxable year . . .

"The Declaration shall also contain such other information for the purpose of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury."

The constitutional provisions under which the court is requested to examine Sections 58 and 294, Title 26, USC (1939 IRC) (in full appendix A) are these:

U. S. Constitution:

1. Article I, Section 9, paragraph 4.
2. Sixteenth Amendment.
3. Fifth Amendment.
4. Fourth Amendment.

Direct Taxation

Article I, Section 9, paragraph 4 provides:—

“No capitalization, or other direct tax shall be had, unless in proportion to the Census or Enumeration hereinbefore directed to be taken.”

A tax on individual incomes is a direct tax and must be apportioned except that the 16th Amendment removed the requirement of apportionment as follows:

“Income Tax. The Congress shall have power to lay and collect taxes on incomes from whatever source derived, without apportionment among the several states and without regard to any census or enumeration.”

Does Section 58 levy a tax on income?

Section 58 is not a tax on income because no income is in existence. The statutes' words are “estimated tax” and “on or before March 15 of the taxable year” and “can be expected,” all of which relate to any event to occur in the future.

“Income” requires “time” for its measurement.

Regulations 118, Sec. 39.41-1, provides in part:

"Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. . . ."

Title 26, Sec. 41 USC (1939 IRC), 53 Stat. 24 as amended provides in part:

"The net income shall be computed upon the basis of the taxpayer's annual accounting period. . . ."

Does Section 58 levy a tax on "estimated income"?

If it is a "tax" measured by future income, it would be (if otherwise constitutional) a direct or capitalization tax and would be in violation of Article I, Section 9, paragraph 4 of the Constitution. *Pollack v. Farmers Loan & Trust Co.*, 158 US 601.

The income tax amendment to the Federal Constitution should not be extended by loose construction so as to repeal or modify except as applied to "income" those provisions of the Constitution that require an apportionment according to proportion for direct taxes upon property, real and personal. *Eisner v. Macomber*, 252 US 189.

A tax on income can not be levied merely because a citizen is alive and might have taxable income.

Due Process and Self Incrimination

The Fifth Amendment to the Constitution of the United States provides (as it applies to this case):

"No person shall . . . be compelled in any criminal case to be a witness against himself nor be deprived of . . . property without due process of law. . . ."

"Due Process"

"Although a statute may impose a tax which is on income within the meaning of 16th Amendment, it must meet the challenge of other provisions of the Constitution. The due process of law clause in the Fifth Amendment has been said to be not a limitation upon the taxing power of Congress except in rare and special instances It serves as a check upon a threatened legislation exceeding that power."

Mertens' Law of Federal Income Taxation, Sixth Revision, Volume 1, Sec. 4.09, Chapter 4, page 10.

"Due Process bars Congress from enactments that shock the sense of fair play which is the essence of due process." Galavan v. Press, 347 US 522 at 530, but see Irvine v. California, 347 US at 133-4.

"The protection of the individual from arbitrary action is the very essence of due process of law." Slochower v. Board of Higher Education of NYC, 350 US 551.

"Indeed one of the prime requisites of any state is 'certainty' and legislative enactment may be declared by the courts to be inoperative and void for uncertainty in the meaning thereof." 50 Am. Jur. 484.

At a very minimum, "due process" requires a "reasonable certainty."

Failure of the courts to require reasonable legislative certainty and failure to provide judicial constancy results in an unstable government, unstable legislative acts and unstable executive decisions. (See discussion of "Adhocness" *Irvine v. California*, 347 US at 147.

No legislation has ever before been attempted in the United States by which the citizen is required to look

into the future and determine what will occur in the weeks or months to come and be required to reduce his occult observations to writing "under penalty of perjury."

If these statutes are held to be constitutional, what then would be the pattern of future legislation?

If the statutes are held constitutional, with the confidence of the public in the courts to which constitutional determinations are entrusted be strengthened by the knowledge that the courts of this land sanction and will judicially approve the legislative matters by which the state of a person's mind can be determined by the Collector of Internal Revenue and penalized if that state of mind was incorrect in the judgment of a person who is not even possessed of the facts except after the "future predictions" have become "past experiences"? What then is the constitutional limitation of such power? Would a statute be constitutional which permitted the Commissioner to make the "guess" instead of the taxpayer?

Justice Frankfurter at the conclusion of his dissenting opinion in *Irvine v. California* (supra) states:

"Our people may tolerate many mistakes of both intent and performance, but with unerring instinct they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature (unlawful search) if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."

"The duty of the courts is limited to interpretation. They can not legislate. The remedy for an un-

lawful or ineffective law is corrective legislation. Judicial legislation by statutory construction, although it has been operative in some instances is nevertheless discouraged . . . Where a statute is unambiguous, the courts can not seek elsewhere for legislative intent. Even where doubt exists, a statute is not to be extended by implication or enlarged by construction so as to embrace matters not specifically covered therein."

Merten's Law of Federal Taxation, Sixth Revision, Volume 1, Section 3.03.

Plaintiffs wonder if our economic system has become so socialistic that it is possible to forecast with "reasonable certainty" the amounts of income a man will earn in the next 12 months? Only such a judicial concept would permit upholding the constitutionality of the Section 58.

Article VI of the Constitution provides:

"This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land and the Judges in every state shall be bound thereby . . . and all judicial officers both of the United States and the several states shall be bound by oath or affirmation to support this constitution."

The decision made here will undoubtedly be determinative of the future course of much legislation. If Section 58 is held to be constitutional by this court, then the constitutional limitations on separation of powers will be emasculated and Congress will have received a constitutional "rubber stamp" from the court to pass whatever legislation is desired and the Bill of Rights may be invoked only by judicial whim.

We find no certainty here. This is the arbitrary or capricious action condemned by the Constitution and by the Supreme Court in *Slochower v. Board of Higher Education*, 350 US 55.

No process or hearing is provided to determine whether an estimate should be made and if, under Section 294 (quoted in the appendix in full) after the income is determined on March 15 of the year following, it turns out you have failed to guess (Section 294 (d) (2), 53 Stat. 88 as amended in full appendix A) within 20% of what the tax turns out to be, the Commissioner is required to assess a penalty and may prosecute for perjury.

Statutory Self Incrimination

Title 26, Section 58 (a) USC (1939 IRC) provides that the estimate or guess as to future income shall be made under penalty of perjury.

Title 18, Section 1621, 62 Stat. 773, provides punishment for perjury as follows:

"Whoever . . . subscribes any material matter which he does not believe to be true is guilty of perjury and shall . . . be fined not more than \$2000. or imprisoned not more than five years or both."

Title 26, Section 294 (d) (1) (A), 53 Stat. 88 in full (in Appendix A) as amended, provides that there shall (except for "reasonable cause" and not willful neglect) be added to the tax 5% of each installment of estimated tax, plus 1% of the unpaid amount for each month during which the installment remains unpaid but not to exceed 10% of each installment.

Taxpayers contend that they were within their constitutional rights and amply justified in failing to attempt to guess what their future income was going to be when they might be faced with a perjury prosecution if the Collector felt that the guess wasn't accurate enough to suit him, and if income as finally determined turned out to be substantially in excess of any estimate which might have been made.

A prosecution would, of necessity, be based solely on the taxpayers' own "estimate."

The result is immediately apparent:

"Statutory Self Incrimination."

Unreasonable Searches and Seizure

The Fourth Amendment to the Constitution of the United States provides in part:

"The right of the people to be secure in their own person, houses, papers and effects against unreasonable searches and seizures shall not be violated."

Where a person is required to make a written declaration of what he believes a future event will turn out to be under penalty of perjury, the act requiring it is an "unreasonable search and seizure" resulting in an insecurity in "person" and "effects." Such a statutory search is "unreasonable" in that it doesn't add any income to the government since the actual income which is to be guessed is actually taxed after it comes into existence. Title 26, Section 11 USC, 53 Stat. 5, as amended, et seq., and Title 26, Section 53 USC, 53 Stat. 28 as amended. See *Boyd v. United States*, 116 US 616.

CONCLUSION

Taxpayer contends that Congress has no power to require a return of income until the income comes into existence.

The cause should be reversed (with instructions to enter a conclusion of law that Title 26, Section 58 USC, Internal Revenue Code 1939, Chapter 120, Section 5 (a); 57 Stat. 141 as amended, 58 Stat. 242; 59 Stat. 559; 62 Stat. 113; 64 Stat. 544; 64 Stat. 945, was unconstitutional and that Title 26, Section 294 USC, Internal Revenue Code 1939, 53 Stat. 88 as amended, 57 Stat. 144; 58 Stat. 37; 58 Stat. 235; 59 Stat. 523; 64 Stat. 545; 64 Stat. 1136; 65 Stat. 465, are unconstitutional and void as violative of the due process and self incrimination provisions of the Fourth and Fifth Amendments to the Constitution of the United States and that Section 58 insofar as it may be an attempted tax on income is unconstitutional and void in that it is not apportioned as required by Article I, Section 9 of the Constitution of the United States and with instructions to enter judgment in favor of plaintiffs for the full sum of \$171.00 with interest from the date of payment.

"The ultimate power to preserve the Constitution in its integrity is conferred by it (the Constitution) on the Courts whose duty it is to prevent its dismemberment by illegitimate and unconstitutional practices which usually gain a foothold by insidious and apparently harmless approaches to meet imagined emergencies or supposed calamities."

The quotation above is adopted by way of conclusion.

Both Congress, the Bench and the Bar, and the people are entitled to know whether these provisions receive the constitutional approbation of the judiciary.

Certainly, these are amazing pieces of Legislation!

Respectfully submitted,

WARDE H. ERWIN, *in propria personam*.

APPENDIX A**26 U. S. C. A. Sec. 58****Declaration of estimated tax by individuals**

(a) *Requirement of declaration.* Every individual [other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621 (a), withholding under Subchapter D of Chapter 9 is not made applicable, but including every alien individual who is a resident of Puerto Rico during the entire taxable year] shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year, if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of \$4,500 plus \$600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed \$100 for the taxable year and his gross income to be \$600 or more.

(b) *Contents of declaration.* In the declaration required under subsection (a) the individual shall state—

(1) the amount which he estimates as the amount of tax under this chapter for the taxable year, without regard to any credits under sections 32 and 35 for taxes withheld at source and without regard to the tax imposed by subchapter E on self-employment income;

(2) the amount which he estimates as the credits for the taxable year under sections 32 and 35; and

(3) the excess of the amount estimated under paragraph (1) over the amount estimated under paragraph (2), which excess for the purposes of this chapter shall be considered the estimated tax for the taxable year.

The declaration shall also contain such other information for the purposes of carrying out the provisions of this chapter as the Commissioner, with the approval of the Secretary, may by regulations prescribe, and shall contain or be verified by a written statement that it is made under the penalties of perjury.

(c) *Joint declaration by husband and wife.* In the case of a husband and wife, a single declaration under this section may be made by them jointly, in which case the liability with respect to the estimated tax shall be joint and several. No joint declaration may be made if either the husband or wife is a nonresident alien. If a joint declaration is made but a joint return is not made for the taxable year, the estimated tax for such year may be treated as the estimated tax of either the husband or the wife, or may be divided between them.

(d) *Time and place for filing.*

(1) *In general.* The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the tax-

able year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

(2) *Amendment of declaration.* An individual may make amendments of a declaration filed during the taxable year under this subsection, under regulations prescribed by the Commissioner with the approval of the Secretary. If so made, such amendments may be filed on or before the fifteenth day of the last month of any quarter of the taxable year subsequent to that in which the declaration was filed and in which no previous amendment has been filed, except that in the case of an amendment filed after September 15 of the taxable year, it may be filed on or before January 15 of the succeeding taxable year. Declarations and amendments thereof shall be filed with the collector specified in section 53(b) (1).

(3) *Return as declaration or amendment.* If on or before January 15 of the succeeding taxable year the taxpayer files a return, for the taxable year for which the declaration is required, and pays in full the amount computed on the return as payable, then, under regulations prescribed by the Commissioner with the approval of the Secretary—

(A) If the declaration is not required to be filed during the taxable year, but is required to be filed on or before such January 15, such return shall, for the purposes of this chapter, be considered as such declaration; and

(B) If the tax shown on the return (reduced by the credits under sections 32 and 35) is greater than the estimated tax shown in a declaration previously made, or in the last amendment thereof, such return shall, for the purposes of this chapter, be considered as the amendment of the declaration permitted by paragraph (2) to be filed on or before such January 15.

(e) *Extension of time.* The Commissioner may grant a reasonable extension of the time for filing declarations and paying the estimated tax, under such rules and regulations as he shall prescribe with the approval of the Secretary. Except in the case of taxpayers who are abroad, no such extension shall be for more than six months.

(f) *Persons under disability.* If the taxpayer is unable to make his own declaration, the declaration shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

(g) *Signature presumed correct.* The fact that an individual's name is signed to a filed declaration shall be prima facie evidence for all purposes that the declaration was actually signed by him.

(h) *Publicity of declaration.* For the purposes of section 55 (relating to publicity of returns), a declaration of estimated tax shall be held and considered a return under this chapter. June 9, 1943, 7 p. m., E. W. T., c. 120, § 5(a), 57 Stat. 141, amended May 29, 1944, 7 p. m., E. W. T., c. 210, Part I § 13(a), 58 Stat. 242; Nov. 8, 1945, 5:17 p. m., p. m., E. S. T., c. 453; Title I, §

102(b) (4), 59 Stat. 559; Apr. 2, 1948, 3:18 p. m., E. S. T., c. 168, Title II, § 202(a), 62 Stat. 113; Aug. 28, 1950, c. 809, Title II, § 208(d) (4), 64 Stat. 544; Sept. 23, 1950, 3:15 p. m., E. D. T., c. 994, Title II, § 221(g), 64 Stat. 945.

26 U. S. C. A. Sec. 294

Additions to the tax in case of nonpayment.

(a) Tax shown on return.

(1) *General rule.* Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

(2) *If extension granted.* Where an extension of time for payment of the amount so determined as the tax by the taxpayer, or any installment thereof, has been granted, and the amount the time for payment of which has been extended, and the interest thereon determined under section 295, is not paid in full prior to the expiration of the period of the extension, then, in lieu of the interest provided for in paragraph (1) of this subsection, interest at the rate of 6 per centum per annum shall be collected on such unpaid amount from the date of the expiration of the period of the extension until it is paid.

(3-5) Omitted. Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, §118(a), 58 Stat. 37.

(b) *Deficiency*. Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(c) *Filing of jeopardy bond*. If a bond is filed, as provided in section 273, the provisions of subsection (b) of this section shall not apply to the amount covered by the bond.

(d) *Estimated tax*.

(1) *Failure to file declaration or pay installment of estimated tax*.

(A) *Failure to file declaration*. In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to wilful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each installment due but unpaid, 1 per centum of the unpaid amount

thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

(B) *Failure to pay installments of estimated tax declared.* Where a declaration of estimated tax has been made and filed within the time prescribed, or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.* If 80 per centum of the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60 (a), or $66\frac{2}{3}$ per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year [or in the case of farmers exercising an election under section 60 (a), within the last quarter] in an amount of at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if

the taxpayer failed to meet the 80 per centum and 66-2/3 per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

(3) *Tax on self-employment income.* This subsection shall be applied without regard to the tax imposed by subchapter E, relating to tax on self-employment income.

(e) *Substantial Overstatement of Expected Carry-Backs.* If the time for payment of any tax or taxes for any taxable year is extended under section 3779, there shall be added to such tax or taxes an amount equal to 5 per centum of the penalty portion, if any, of the amount to which such extension relates, unless the taxpayer establishes to the satisfaction of the Commissioner that, as of the end of the taxable year in which such extension was made, there was reasonable cause to expect there would be no such penalty portion. The penalty portion shall be the excess of the amount to which such extension relates which is not paid by the end of the taxable year in which such extension is made over 125 per centum of the amount to which such extension relates which is satisfied by applying thereto a decrease in tax in respect of an application under section 3780(a)

less any amounts assessed in respect of such application which are not so satisfied. 53 Stat. 88, amended June 9, 1943, 7 p. m., E. W. T., c. 120, § 5(b), 57 Stat. 144; Feb. 25, 1944, 12:49 p. m., E. W. T., c. 63, Title I, § 118(a), 58 Stat. 37; May 29, 1944, 7 p. m., E. W. T., c. 210, Pt. I, §§ 6(b), (8), 13(b), 58 Stat. 235, 244; July 31, 1945, c. 340, § 4(b), 59 Stat. 523; Aug. 28, 1950, c. 809, Title II, § 208(d) (8), 64 Stat. 545; Jan. 2, 1951, c. 1195, § 2, 64 Stat. 1136; Oct. 20, 1951, 2:07 p. m., E. S. T., Title I, § 103(b), 65 Stat. 465.

No. 15627

United States
Court of Appeals
for the Ninth Circuit

TORRANCE NATIONAL BANK, a national
banking association, Appellant,

vs.

THE AETNA CASUALTY & SURETY COM-
PANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California,
Central Division

FILED

AUG 21 1957

PAUL P. O'BRIEN, CLERK

No. 15627

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TORRANCE NATIONAL BANK, a national
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

McLAUGHLIN & CASEY,

1224 Bank of America Building,
650 South Spring Street,
Los Angeles 14, California.

For Appellee:

CRIDER, TILSON & RUPPE,

Room 530, Fidelity Building,
548 South Spring Street,
Los Angeles 13, California. [1]*

* Page numbers appearing at bottom of page of Original Transcript of Record.

In The District Court of the United States, Southern District of California, Central Division

No. 15726-C

TORRANCE NATIONAL BANK, a national banking association, Plaintiff,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation, Defendant.

AMENDED COMPLAINT FOR
DECLARATORY RELIEF

Comes now the plaintiff above named and pursuant to leave granted by the above-entitled Court at the time of the making of its order granting defendant's motion for a more definite statement, files its amended complaint, and for a cause of action against the defendant, alleges:

I.

Plaintiff above named is now and has been at all times herein mentioned, a national banking association organized and existing under and by virtue of the laws of the United States and having its office and principal place of business in the City of Torrance, County of Los Angeles, State of California.

II.

Defendant The Aetna Casualty & Surety Company is now and has been at all times herein men-

tioned, a corporation organized and existing under and by virtue of the laws of the State of [2] Connecticut, duly qualified to transact business in the State of California.

III.

That on the 25th day of June, 1948, the defendant signed, sealed and delivered to plaintiff an instrument in writing designated as "Bankers Blanket Bond." That a photostatic copy of such bond is attached hereto, marked Exhibit "A" and made a part hereof. That at the time of the issuance and delivery of the said bond, said defendant also signed and caused to be attached to the said bond and delivered to plaintiff with the said bond, three instruments each of which is designated as "Rider." That photostatic copies of said three riders are attached hereto, marked Exhibits "B," "C" and "D" respectively, and made and part hereof.

IV.

That on the 25th day of June, 1951, said defendant signed, issued and delivered to plaintiff an instrument in writing designated as "Rider," a photostatic copy of which is attached hereto, marked Exhibit "E" and made a part hereof. That the said bond, as amended by the said riders hereinabove described, is now and has been at all times herein mentioned, in full force and effect.

V.

Enesco Federal Credit Union is now and has been at all times herein mentioned, a federal credit

union organized as a corporation under the laws of the United States of America and having its principal place of business in the City of Torrance, County of Los Angeles, State of California. That at all times herein mentioned, Joseph Alden was Secretary, Treasurer and General Manager of Enesco Federal Credit Union.

VI.

That on the 2nd day of April, 1953, Enesco Federal Credit Union maintained a checking account with plaintiff and had on deposit with plaintiff in said account, the sum of \$10,483.07. That [3] on the said date, Joseph Alden presented to plaintiff a check payable to "cash" wherein and whereby plaintiff was directed to pay to the order of "cash" the sum of \$30,000.00. That Joseph Alden signed the said check as Secretary and Treasurer of Enesco Federal Credit Union and presented the said check to plaintiff for payment on the 2nd day of April, 1953. That a photostatic copy of said check with the endorsements on the reverse side is attached hereto, marked Exhibit "F" and made a part hereof. That plaintiff thereupon received the said check from Joseph Alden and paid on account of the said check the sum of \$30,000.00 in currency, lawful money of the United States. That all of the said currency was delivered to the said Joseph Alden at said time, who thereupon left the plaintiff's banking premises with the said currency.

That at the time Joseph Alden presented the said check and received the currency as above de-

scribed, he orally stated and represented to plaintiff that the said currency was needed by Enesco Federal Credit Union for the purpose of cashing payroll checks of employees of National Supply Company, a corporation, in Torrance, California, on April 3, 1953, and that the payroll checks cashed for such employees would forthwith be endorsed and delivered to plaintiff in repayment of any overdraft on the account of Enesco Federal Credit Union and for the purpose of crediting any balance remaining after the repayment of any such overdraft to the bank account of Enesco Federal Credit Union.

VII.

That Joseph Alden had not been authorized by Enesco Federal Credit Union to sign the said check or to present it to plaintiff or to receive the said \$30,000.00, or any part thereof from plaintiff. That the said Joseph Alden had forged the name of Enesco Federal Credit Union to the said check and said Joseph Alden at all times intended to use the said check for the purpose of obtaining the \$30,000.00 in cash, and intended to use [4] the said \$30,000.00 for his own use and benefit and not for the use or benefit of Enesco Federal Credit Union.

VIII.

That plaintiff at all times believed that the said check was genuine and that Joseph Alden had the authority to sign the said check in behalf of Enesco Federal Credit Union, and believed that the \$30,000.00 which plaintiff paid on account of said check

to Joseph Alden was to be used by Joseph Alden for the use and benefit of Enesco Federal Credit Union, in connection with the business and activities of Enesco Federal Credit Union, that is, the business of cashing checks for employees of National Supply Company, a corporation. That plaintiff would not have cashed the said check or paid out the said \$30,000.00, or any part thereof, to Joseph Alden, if plaintiff had known that Joseph Alden had no authority to sign the said check on behalf of Enesco Federal Credit Union and that Joseph Alden had no authority from Enesco Federal Credit Union to overdraw the said account and to receive the said \$30,000.00.

IX.

That at all times Joseph Alden was authorized by Enesco Federal Credit Union to draw checks on the account of Enesco Federal Credit Union at plaintiff's bank and to withdraw moneys from such account upon the presentation of any such checks for the purpose of obtaining moneys for the use of Enesco Federal Credit Union's business of lending money to its members and of paying expenses of its operation, but the said Joseph Alden was never authorized to draw checks on the said account for the purpose of obtaining money for use in the check cashing business of Joseph Alden, and Joseph Alden was never authorized to use any checks so drawn by him and to overdraw the Enesco Federal Credit Union's account at plaintiff's bank, that is, to receive money on account of any such checks in excess of the amount of money which Enesco [5]

Federal Credit Union had on deposit with plaintiff's bank. That the said withdrawal of the said \$30,000.00 by Joseph Alden was unauthorized by Enesco Federal Credit Union and improper, for each of the following reasons:

1. In withdrawing the \$30,000.00 upon the presentation of such check, Joseph Alden overdrew the account of Enesco Federal Credit Union in the sum of \$19,516.93.

2. Joseph Alden had not been authorized by Enesco Federal Credit Union to withdraw or use any funds of Enesco Federal Credit Union in connection with the check cashing business and operations of Joseph Alden.

That plaintiff at all times believed that Joseph Alden did have the authority to withdraw the said \$30,000.00, even though such withdrawal overdrew the account of Enesco Federal Credit Union and plaintiff further believed at all times that Joseph Alden was operating a check cashing business on the premises of Enesco Federal Credit Union for and in behalf of Enesco Federal Credit Union; that plaintiff did not know that such check cashing business was a business of Joseph Alden and not a business of Enesco Federal Credit Union.

X.

Plaintiff is informed and believes and upon such information and belief alleges: That the said \$30,000.00 in currency paid by the plaintiff to Joseph Alden, as hereinabove alleged, never was used for the purpose of cashing payroll checks as above de-

scribed; that Joseph Alden was robbed of the said \$30,000.00 in currency while returning from plaintiff's bank to his place of business at Enesco Federal Credit Union, and the said currency never was received by Enesco Federal Credit Union.

XI.

That in truth and in fact, Enesco Federal Credit Union had not been cashing payroll checks of employees of National Supply [6] Company and had not been engaging in the business of cashing checks at all, but that said business of cashing checks had been carried on by Joseph Alden on the premises of Enesco Federal Credit Union and it was the intention of Joseph Alden at all times to obtain the said money from plaintiff on the said check and to use the said funds in connection with Joseph Alden's said check cashing activities.

XII.

That plaintiff has been damaged in the sum of \$30,000.00 by reason of its payment of the said \$30,000.00 to Joseph Alden on the check described under Paragraph VI hereinabove and plaintiff has not been reimbursed for any part of the said \$30,000.00.

XIII.

That plaintiff heretofore filed an action in the Superior Court of the State of California in and for the County of Los Angeles, bearing said Superior Court No. 612214, against Enesco Federal Credit Union as defendant, in which action plain-

tiff contended that plaintiff had the right to offset a balance of \$10,483.07 which was on deposit in plaintiff's bank to the credit of Enesco Federal Credit Union at the time that the said check was cashed and the \$30,000.00 paid to Joseph Alden as hereinabove alleged, and plaintiff also sought to recover the difference between the said \$10,483.07 and the \$30,000.00, to-wit: the sum of \$19,516.93 from Enesco Federal Credit Union.

That on the 30th day of June, 1954, the said Superior Court rendered judgment in plaintiff's favor in said action confirming plaintiff's right to offset the said \$10,483.07 deposit and awarding plaintiff a recovery against Enesco Federal Credit Union in the sum of \$19,516.93 and the said judgment was thereafter entered on July 1, 1954, in Book 2748 at page 6 of Judgments.

That subsequent to the rendering of the said judgment, Enesco Federal Credit Union filed an appeal from the said judgment and on the 11th day of July, 1955, the District Court of Appeal of [7] the State of California, Second Appellate District, Division 1, rendered a decision on the said appeal wherein and whereby it reversed the judgment of the said Superior Court and held that plaintiff was not entitled to recover the \$19,516.93 or to offset the \$10,483.07 of Enesco Federal Credit Union on deposit with plaintiff. That on the 17th day of October, 1955, a judgment was entered by the Superior Court in Book 2979, Page 271-A of Judgments pursuant to the decision of the said District Court of Appeal wherein and whereby plaintiff was

denied any recovery against defendant Enesco Federal Credit Union and defendant Enesco Federal Credit Union was awarded a judgment against plaintiff for the amount of the said deposit, to-wit: \$10,483.07.

XIV.

That a controversy and dispute has arisen between plaintiff and defendant herein and now exists in that the respective parties are contending and asserting as follows:

1. Plaintiff contends and asserts that plaintiff's loss of the said \$30,000.00 is one for which defendant is obligated to reimburse plaintiff under the above described Bankers Blanket Bond, and particularly under the rider to such bond, copy of which is attached hereto and marked Exhibit "D" wherein and whereby the said Bankers Blanket Bond is extended to cover:

"Any loss (1) through accepting, cashing or paying forged or altered checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds, certificates of deposit, letters of credit, warrants, money orders, or orders upon public treasuries, or any of said instruments bearing forged endorsements, acceptances or certifications, or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, drafts, acceptances, orders, receipts, [8] letters of credit, warrants or certificates, or (3) through transferring, paying, or delivering any funds or property or establishing any credit or giv-

ing any value on the faith of any written instructions or advices, directed to the insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or property, which instructions or advices purport to have been signed or endorsed by any customer of the insured or by any banking institution but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution," * * *

2. The defendant denies and disputes such contention and contends and asserts that there is no liability under the said bond.

Wherefore, plaintiff prays judgment that the above-entitled Court determine and declare the rights and liabilities of the parties hereto in connection with the disputes and controversies herein and that plaintiff recover such other and further relief as to the Court may seem just and proper, together with its costs herein.

McLAUGHLIN & CASEY and
DONALD ARMSTRONG,

/s/ By JAMES A. McLAUGHLIN,
Attorneys for Plaintiff. [9]

Duly Verified. [10]

Affidavit of Service by Mail Attached. [20]

[Endorsed]: Filed Nov. 4, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 5, 1955. At: Los Angeles, Calif.

Present: Hon. James M. Carter, District Judge.

Deputy Clerk: L. B. Figg. Reporter: Samuel Goldstein.

Counsel for Plaintiff: James A. McLaughlin.

Counsel for Defendant: Donald E. Ruppe.

Proceedings: For hearing motion of defendant, filed Nov. 25, 1955, to dismiss the action, on the ground that the amended complaint fails to state a claim for the reason that the action has become moot.

It Is Ordered that plaintiff may file an amendment to the complaint within ten days re allegations of jurisdiction, etc., and

It Is Stipulated and Ordered that defendant's motion to dismiss be deemed to apply to the complaint as so amended.

Attorney Ruppe argues in support of motion to dismiss.

It Is Ordered that cause as to said motion to dismiss stand Submitted upon filing of supplemental briefs 10x10x5, defendant to open.

JOHN A. CHILDRESS,
Clerk,

By L. B. FIGG,
Deputy Clerk. [21]

[Title of District Court and Cause.]

AMENDMENT TO AMENDED COMPLAINT
FOR DECLARATORY RELIEF

Comes Now plaintiff, above named, and pursuant to leave granted heretofore by the above-entitled Court on December 5, 1955, files this amendment to plaintiff's Amended Complaint for Declaratory Relief by adding a Paragraph IIA and alleging facts pertaining to jurisdiction as follows:

IIA.

That jurisdiction of the above-entitled Court is conferred by reason of diversity of citizenship of plaintiff and defendant under the provisions of Section 1332(1) of the Jurisdictional Code of the United States, in that plaintiff is a citizen of the State of California and defendant is a citizen of the State of Connecticut and in that the subject matter of the controversy, to-wit, the amount which plaintiff seeks to recover on the surety bond executed by the defendant, exceeds the sum of \$3,000.00 [22] exclusive of interest and costs. The remedial statutes under which plaintiff seeks relief are Sections 2201 and 2202 of the Jurisdictional Code of the United States (Title 28, U.S.C.A.).

Wherefore, plaintiff prays judgment for the relief as prayed for in its Amended Complaint on file herein.

DONALD ARMSTRONG and
McLAUGHLIN & CASEY,

/s/ By JAMES A. McLAUGHLIN,
Attorneys for Plaintiff. [23]

Duly Verified. [24]

Affidavit of Service by Mail Attached. [25]

[Endorsed]: Filed Dec. 9, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 29, 1956. At: Los Angeles, Calif.

Present: Hon. James M. Carter, District Judge.

Deputy Clerk: L. B. Figg. Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings: The motion of defendant, filed Nov. 25, 1955, to dismiss the action, having been submitted to the Court, and the Court having duly considered it,

It Is Ordered that said motion be, and it hereby is denied.

JOHN A. CHILDRESS,

Clerk,

By L. B. FIGG,

Deputy Clerk. [26]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT AND
AMENDMENT TO AMENDED COM-
PLAINT FOR DECLARATORY RELIEF

Comes Now defendant, The Aetna Casualty & Surety Company, a corporation, and, appearing for itself alone and not for any other defendant herein, answers plaintiff's Amended Complaint and Amendment to Amended Complaint and denies, admits and alleges:

I.

This answering defendant admits Paragraph I.

II.

This answering defendants admits Paragraph II.

IIA.

This answering defendant admits Paragraph IIA of plaintiff's Amendment to Amended Complaint for Declaratory Relief.

III.

This answering defendant admits Paragraph III.

IV.

This answering defendant admits Paragraph IV.

V.

This answering defendant admits Paragraph V.

VI.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VI, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

VII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VII, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

VIII.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph VIII, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

IX.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph IX, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

X.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph X, and placing its answer on that

ground denies, generally and specifically, [28] said paragraph, and each and every allegation therein contained.

XI.

That this answering defendant does not have sufficient information or belief to enable it to answer Paragraph XI, and placing its answer on that ground denies, generally and specifically, said paragraph, and each and every allegation therein contained.

XII.

Answering Paragraph XII of plaintiff's Amended Complaint, this answering defendant denies that plaintiff has been damaged in the sum of \$30,000.00 or in any other sum at all by reason of the alleged payment of \$30,000.00 to Joseph Alden. As to whether or not plaintiff has been reimbursed for any part of said \$30,000.00, answering defendant has no information or belief sufficient to answer and placing its answer on that ground denies, generally and specifically, the remainder of said paragraph and each and every allegation therein contained.

XIII.

This answering defendant admits Paragraph XIII.

XIV.

This answering defendant admits Paragraph XIV.

For A Second, Separate, Further and Distinct Answer and Defense Herein, This Answering Defendant Alleges:

I.

Answering defendant is informed and believes and upon such information and belief avers that plaintiff made an oral agreement with one Joseph Alden, whereby said Joseph Alden came into said plaintiff bank and obtained monies with which to cash checks and that under said arrangements it was agreed that said Joseph Alden could leave a check with plaintiff bank drawn on the Enesco Federal Credit Union and receive from said bank cash. [29] That when he returned the checks which he had cashed that the check of the Enesco Federal Credit Union would be returned to him. That said practice commenced at some time after the 17th day of August, 1950.

That on April 2, 1953, pursuant to said agreement, the said Joseph Alden presented a check for the sum of \$30,000.00 referred to in plaintiff's Complaint and received currency therefrom. That said check was drawn upon the account of Enesco Federal Credit Union which at said time had a deposit with said bank a sum less than \$30,000.00; that by reason of said agreement and arrangement said payment by plaintiff of the sum of \$30,000.00 was a loan of said sum to said Joseph Alden or Enesco Federal Credit Union.

Wherefore, this answering defendant prays that plaintiff take nothing against it by reason of its action herein, and that this answering defendant have judgment against plaintiff for its cost incurred

herein, and for such other and further relief as may seem just and proper.

CRIDER, TILSON & RUPPE,
/s/ By DONALD E. RUPPE,
Attorneys for Defendant, The Aetna Casualty &
Surety Company, a corporation. [30]

Affidavit of Service by Mail Attached. [31]

[Endorsed]: Filed March 20, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Nov. 28, 1956, at Los Angeles, Calif.

Present: Honorable Ernest A. Tolin, District Judge.

Deputy Clerk: W. E. Payne. Reporter: Virginia Wright.

Counsel for Plaintiff: James A. McLaughlin.

Counsel for Defendant: Garvin F. Shallenberger.

Proceedings: For Court trial. Court convenes herein at 1:40 P.M. All parties are present.

Counsel stipulate to certain facts.

Joseph R. Alden is called, sworn, and testifies for plaintiff.

Plf's Ex. 1, 2, 3, and 4 are marked for ident. and admitted in evidence.

Wm. A. Hood, Gale W. Whitacre, and Anna Sandstrom, witnesses for plaintiff, respectively, are called, sworn, and testify.

Plaintiff rests.

At 3:25 P.M. court recesses. At 3:40 P.M. court reconvenes herein. All parties are present.

Counsel stipulate to certain facts re dating and cashing of checks.

Defendant rests.

At 3:40 P.M. counsel for plaintiff makes closing statement.

At 3:55 P.M. counsel for defendant makes closing statement and concludes at 4 P.M. Counsel for plaintiff replies only briefly.

Court Orders that the matter stand submitted.

At 4:02 P.M. court adjourns.

Exhibits are placed in case file. [32]

JOHN A. CHILDRESS,

Clerk,

By WAYNE E. PAYNE,

Deputy Clerk.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

Torrance National Bank, a corporate citizen of the State of California, instituted this action against The Aetna Casualty & Surety Company, a corporate citizen of the State of Connecticut, in the Superior Court of the State of California. Defendant procured removal to this Court pursuant to Title 28, U.S.C.A., §1441 (a) (Diversity of citizenship).

Plaintiff seeks to recover upon a Bankers' [33]

Blanket Bond and a rider thereto¹ the loss it sustained in a transaction bottomed upon a worthless check. The parties do not dispute that the law of California is applicable, and that there is no right of recovery upon the bond unless the check is a "forgery."

Enesco Federal Credit Union, a depositor of plaintiff Bank, had since 1949 employed one Joseph Alden as its Treasurer. By both the Act² under

¹ "Rider

" * * *

"1. The attached bond is hereby extended to cover—"Forgery Insuring Clause

"(D) Any loss (1) through accepting cashing or paying forged or altered checks . . . , or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks . . . , or (3) through transferring, paying or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instructions or advices, directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instruction or advices purport to have been signed or endorsed by any customer of the Insured . . . but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer . . . , or (5) through the payment by the Insured of promissory notes which are payable at the Insured or which purport to be notes payable at the Insured under instructions from any depositor thereof, and which are actually paid by the Insured out of funds on deposit with it, and which prove to be forged or altered or which bear forged endorsements . . . " [34]

² Title 12, U.S.C.A., §§ 1761 et seq.

which Enesco was incorporated and a Resolution of its Board of Directors (a copy of which was furnished to plaintiff), Alden was authorized to sign all the checks of the corporation. In addition to managing the affairs of Enesco, Alden during this period operated a paycheck cashing service upon his employer's premises for his own profit. In order to obtain the necessary funds for this personal business, Alden had a long-standing arrangement with the responsible officers of plaintiff Bank whereby on each Thursday he would leave with the Bank teller an unnumbered check, dated the following day drawn upon the account of his employer and signed by himself as Enesco's Treasurer. Alden would receive in exchange from the Bank, after the close of banking hours, a briefcase containing a substantial sum of money to be used by him the next day in cashing paychecks. The practice was that the check would be held in the teller's cash drawer without entering it in the Bank's records in order to give Alden time to cash paychecks, deposit them in the Bank in another account, and exchange his check on the other account for the Enesco check held by the Bank. Under this procedure no entry of the transaction would appear upon Enesco's monthly bank statement, which was subject to the scrutiny of both the [35] members of Enesco's Board of Directors and the Federal Bank Examiner.

For this special service to Alden the Bank charged him a small weekly fee.

Although the Bank's officials knew the purpose

for which Alden intended to use the money so obtained, they were unaware that Alden had no authority from Enesco's Board of Directors to sign corporate checks for his own check cashing business. At least in part because of the irregular routing of these Thursday checks by the Bank, the Directors of Enesco knew nothing of these weekly transactions between their Treasurer and the Bank.

On Thursday, April 2, 1953, this weekly system suffered a blow. Alden left with the Bank teller a check for \$30,000.00 drawn upon the Enesco account and signed by himself as Treasurer. On that date Enesco's account with the Bank was only slightly in excess of \$10,000.00. On his way from the Bank to the offices of Enesco with the \$30,000.00 received from plaintiff, Alden was robbed of the money.

The Bank thereafter attempted to charge the check against the Enesco account and to collect the \$19,516.93 deficiency by suit. In *Torrance National Bank v. Enesco Federal Credit Union*, 134 Cal. App. 316, 285 P.2d 737 (1955), the California District Court of Appeal decided that the check was not authorized either actually or ostensibly by Enesco, and that the Bank must bear the loss.

The Bank now seeks indemnification under that portion of the bond issued to it by defendant which insures against loss sustained upon "forged" instruments.

Plaintiff contends that the unauthorized [36] signing by an agent of his own name as agent con-

stitutes a "forgery". If this contention is valid, plaintiff's suit correctly seeks indemnification for its loss.

In his legal argument, counsel for the Bank has misconstrued the effect of the famous rule of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938). That case, in very clear if prolix treatment of the subject, declares that in cases wherein a Federal Court applies state law, it must apply that law as it has been declared by the State whose law is in question. That decision in 1938 has been presaged by a statement of Justice Oliver Wendell Holmes in a dissenting opinion in 1916 when he wrote, "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified" ³ The sovereign to whose articulate voice this Court must hearken is the State of California. To fail to do so would be to totally disregard *Erie Railroad Co. v. Tompkins*, for we are not to speculate what California should do were it to look to natural justice, or the "brooding omnipresence in the sky", but instead, this Court must look to see what the sovereign State of California has articulated either by statutory enactment or judicial decision.

As early as 1896, in *People v. Bendit*, III Cal. 274, 43 P. 901 (1896), the Supreme Court of California unequivocally articulated the law to be that an instrument signed by the one purporting to have

³ *Southern Pacific Co. v. Jensen*, 37 Sup. Ct. 524, 531; 244 U.S. 205.

executed it is not [37] a "forgery". Plaintiff asserts that this Court should not follow the Bendit decision. He has cited a group of adjudicated cases⁴ which he contends will by analogy lead this Court to declare that under the modern rule, Bendit would be decided differently. ⁵ Counsel's argument that other cases foretell a different result when Cali-

⁴ *People v. Thorn*, 138 Cal App. 714, 33 P.2d 5 (1934) (The California District Court of Appeal has recently distinguished the case from the issue presented here);

People v. McKenna, 11 Cal.2d 327, 79 P.2d 1065 (1938);

People v. McPherson, 6 Cal. App. 266, 91 P.1098 (1907) (substantially different in that defendant actually signed the name of another without authority instead of, as in the case now being decided, signed his own name for an unauthorized purpose.)

Quick Service Box Co. v. St. Paul Mercury Indemnity Co., 95 F.2d 15 (7 Cir. 1938). (The decision there supports plaintiff's theory here.) However, in *Fitzgibbons Boiler Co. v. Employers' Liability Assur. Corp.*, 105 F.2d 893, (2 Cir. 1939), Augustus Hand, J., states that the Quick Service Box Co. case represents a minority view.

⁵ This Court does not overlook that in some situations a federal court, in a diversity suit, may refuse to follow a state supreme court decision. It is not necessary that a case be expressly overruled [38] in order to lose its persuasive force. Cf. *Mason v. American Emery Wheelworks*, — F.2d —, (1 Cir. March 8, 1957). The law is in part an evolutionary process of judicial reasoning. If convinced that the California Supreme Court would no longer follow the Bendit case, then, under the *Erie Railroad Co. v. Tompkins* decision, this Court should apply the same standards which it believes the highest court of this State would use.

fornia again adjudicates the problem directly falls when a survey of recent cases discloses that in 1955, after considering the very authorities here cited by plaintiff, a California [38] Appellate Court followed Bendit in holding that a genuinely made instrument is not a forgery. ⁶Hearing was denied by the Supreme Court of the State.

In the Bendit case, the California Supreme Court declared a rule which forecloses plaintiff from recovery. A District Court of Appeal in California has recently reaffirmed the doctrine of that case, and the California Supreme Court refused to review that decision. The voice of the sovereign to which this Court hearkens in a diversity case has been adequately articulate.

Counsel for defendant will submit Findings of Fact, Conclusions of Law and Judgment for defendant.

Dated: This 28th day of March, 1957.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed March 28, 1957. [39]

⁶Pasadena Investment Co. v. Peerless Casualty Company, 132 Cal. App. 2d 328, 282 Pac. 2d 124 (1955). This decision on local law by a highly respected intermediate court of appeal must be accorded great weight. West v. American Telephone & Telegraph Co., 311 U. S. 223 (1940).

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 11, 1957, at Los Angeles, Calif.

Present: Honorable Ernest A. Tolin, District Judge.

Deputy Clerk: W. E. Payne. Reporter: Virginia Wright.

Counsel for Plaintiff: James A. McLaughlin.

Counsel for Defendant: Garvin F. Shellenberger.

Proceedings: For hearing plaintiff's motion to re-open and re-argue law. Court orders said motions of plaintiff denied.

JOHN A. CHILDRESS,
Clerk,

By WAYNE E. PAYNE,
Deputy Clerk. [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the above entitled Court, the Honorable Ernest A. Tolin, Judge presiding, on November 28, 1956, a jury trial having been expressly waived by the parties, plaintiff appearing by James A. McLaughlin of the firm of McLaughlin & Casey, its attorneys, and defendant appearing by Garvin F. Shellenberger of the firm of Crider, Tilson &

Ruppe, its attorneys, whereupon evidence, both oral and documentary, was offered and received, stipulations were entered into, and the trial of the said action having been completed on November 28, 1956, and the Court having duly considered the evidence, stipulations and arguments, and being fully advised in the premises, now files its findings of fact and conclusions of law, as follows:

Findings of Fact

I.

Plaintiff Torrance National Bank is now and has been at all times herein mentioned, a national banking association organized and existing under and by virtue of the laws of the United States and having its office and principal place of business in the City of Torrance, County of Los Angeles, State of California.

II.

Defendant The Aetna Casualty & Surety Company is now and has been at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, duly qualified to transact business in the State of California.

III.

That plaintiff and defendant have diversity of citizenship in that plaintiff is a citizen of the State of California and defendant is a citizen of the State of Connecticut; that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

IV.

That on June 25, 1948, the defendant signed, sealed, and delivered to plaintiff a written instrument designated "Bankers Blanket Bond"; that said bond was introduced into evidence in the trial of said case and provided, among other things, for indemnification of the plaintiff by the defendant up to the amount of \$10,000.00 in the event of losses falling within the terms and provisions set forth in a rider attached to said bond, which rider also was dated June 25, 1948, and reads in part as follows:

"Forgery Insuring Clause

"(D) Any loss (1) through accepting, cashing or paying forged or altered checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds, certificates of deposit, letters of credit, [42] warrants, money orders, or orders upon public treasuries, or any of said instruments bearing forged endorsements, acceptances or certifications, or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, drafts, acceptances, orders, receipts, letters of credit, warrants or certificates, or (3) through transferring, paying, or delivering any funds or Property or establishing any credit or giving any value on the faith of any written instruction or advices, directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured

or by any banking institution but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution, * * *”

V.

That the said bond, including said rider, was at all times material in full force and effect.

VI.

That Enesco Federal Credit Union was at all times herein mentioned a federal credit union organized by employees of National Supply Company, a corporation, under the laws of the United States of America and having its principal place of business in the City of Torrance, County of Los Angeles, State of California. That at all times herein mentioned, Joseph Alden was Secretary, Treasurer and General Manager of Enesco Federal Credit Union.

VII.

That on the 3rd day of April, 1953, and for a long time [43] prior thereto, Enesco Federal Credit Union maintained a checking account with plaintiff and on said date had on deposit with plaintiff in said account the sum of \$10,483.07. That on the 2nd day of April, 1953, Joseph Alden presented to plaintiff a check dated April 3, 1953, payable to “cash” wherein and whereby plaintiff was directed to pay to the order of “cash” the sum of \$30,000.00. That Joseph Alden signed the said check as Secretary of Enesco Federal Credit Union. That a photo-

static copy of said check, including the stamp thereon which reads "Paid 4-4-53," was introduced into evidence; that plaintiff, upon receiving said check, after business hours on said date of April 2, 1953, delivered to the said Joseph Alden \$30,000.00 in currency, lawful money of the United States.

VIII.

That said check was presented to plaintiff and the currency delivered to said Joseph Alden in accordance with a long-established practice which had prevailed for many years prior to April 2, 1953. This prior practice consisted of the following: Joseph Alden would, on Thursday of each week after the close of business by plaintiff, bring to plaintiff bank a check drawn on Enesco Federal Credit Union's account, signed by Joseph Alden as Secretary of Enesco Federal Credit Union; that Joseph Alden would exchange said check for currency in an amount equal to the face amount of such check, which varied somewhat from week to week although it usually was in an amount which was in excess of that carried in the account of the said Enesco Federal Credit Union; that said Joseph Alden used said currency to cash payroll checks for employees of National Supply Company whose employees had formed the said Enesco Federal Credit Union; that the Enesco Federal Credit Union had not authorized the use of any of its funds to carry on the check-cashing operation hereinafter described; that said Joseph Alden carried on said check-cashing operation on premises assigned to Enesco Federal

Credit Union at the National Supply Company's [44] plant in Torrance, California, and the said Joseph Alden made a charge for cashing each of such payroll checks, and such charges were kept by the said Joseph Alden who was carrying on such check-cashing operation for his own personal gain; that the plaintiff bank knew the purpose for which the currency so secured by said Joseph Alden was being used, but did not know that the said Joseph Alden lacked authority to so use the funds; that plaintiff bank would hold each of such checks drawn on the Enesco Federal Credit Union account, without processing them through their books and records, until the Monday following the presentation of same; that on such Monday the said Joseph Alden would deposit sufficient of the checks that he had cashed to an account he maintained in the said plaintiff bank under the name of Enesco Service Fund; that he would then write a check, payable to plaintiff bank, on the Enesco Service Fund account in a sufficient amount to cover the check that had been presented on the previous Thursday, and the bank would, at that time, return to him the check which he had presented on Thursday drawn on the Enesco Federal Credit Union account; that such checks, although presented on Thursday, always were dated the following day, and were unnumbered; that because of this longstanding practice, neither the bank's records nor the records of Enesco Federal Credit Union reflected the fact that such checks were being drawn on the Enesco Federal Credit Union account.

IX.

That on said date of April 2, 1953, the Enesco Federal Credit Union had a balance of \$10,483.07 in its account at plaintiff bank.

X.

That said Joseph Alden was authorized to draw checks on the Enesco Federal Credit Union account during the entire duration of the above described practice, and he remained so authorized until he was relieved of his position sometime after April 4, 1953. [45]

XI.

After leaving the premises of plaintiff bank on April 2, 1953, said Joseph Alden was robbed of the \$30,000.00 which he had received from said bank; that no part of such currency was ever returned to plaintiff or to Joseph Alden; that plaintiff has, to date, recovered none of the said \$30,000.00 from Enesco Federal Credit Union, or otherwise; that plaintiff instituted an action against Enesco Federal Credit Union in which a final judgment was entered determining that plaintiff bank was not entitled to recover the \$30,000.00, or any portion thereof, from the Enesco Federal Credit Union, or from any funds in its account with plaintiff bank; that said decision is reported in 134 C.A. 2d 316.

XII.

That a controversy and dispute has existed between the plaintiff and defendant in that plaintiff

contended the defendant is obligated under the said rider attached to the said bond to reimburse plaintiff for the amount of its loss up to \$10,000.00 because the check which was presented to plaintiff bank on April 2, 1953, was a forgery; whereas, the defendant denied such contention and maintained that said check was not a forgery and therefore no obligation exists on the part of the defendant to reimburse plaintiff for any of the loss it has sustained.

XIII.

All matters hereinabove set forth which are stated to be findings of fact are hereby declared to be conclusions of law if the same are determined to be more properly conclusions of law.

Conclusions of Law

From the foregoing the Court hereby concludes, and as a matter of law hereby makes the following conclusions of law.

I.

That the check dated April 2, 1953, in the amount of [46] \$30,000.00 which was drawn on the Enesco Federal Credit Union account, and signed by Joseph Alden as Secretary of the Enesco Federal Credit Union, was not a forged instrument.

II.

That plaintiff suffered no loss through the accepting, cashing or paying of any forged check or instrument, or from any other cause which is covered by

the Bankers Blanket Bond dated June 25, 1948, with riders, issued by the defendant to plaintiff.

III.

That plaintiff is not entitled to any judgment against defendant.

IV.

That defendant is entitled to a judgment in its favor and against plaintiff declaring that the defendant has no liability to the plaintiff under said bond, or its riders, and further declaring that no forgery was committed in connection with the said check or instrument dated April 2, 1953.

V.

That defendant is entitled to its costs herein.

Let Judgment Be Entered Accordingly.

Dated May 21, 1957.

/s/ ERNEST A. TOLIN,

Judge. [47]

Affidavit of Service by Mail Attached. [48]

[Endorsed]: Filed June 3, 1957. Entered June 4, 1957.

In The District Court of the United States, Southern District of California, Central Division

No. 15,726-T

TORRANCE NATIONAL BANK, a national
banking association, Plaintiff,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation, Defendant.

JUDGMENT

The above entitled action came on regularly for trial in the above entitled Court, the Honorable Ernest A. Tolin, Judge presiding, on November 28, 1956, a jury trial having been expressly waived by the parties, plaintiff appearing by James A. McLaughlin of the firm of McLaughlin & Casey, its attorneys, and defendant appearing by Garvin F. Shallenberger of the firm of Crider, Tilson & Ruppe', its attorneys, whereupon evidence, both oral and documentary, was offered and received, stipulations were entered into, and the trial of the said action having been completed on November 28, 1956, and the Court having duly considered the evidence, stipulations and arguments, and being fully advised in the premises, and having heretofore signed and filed herein its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: [49]

1. That any loss which plaintiff may have sustained by reason of its transactions in connection with that certain check dated April 2, 1953, drawn on the Enesco Federal Credit Union account in plaintiff bank, and signed by Joseph Alden as Secretary of Enesco Federal Credit Union, is not a loss covered by the Bankers Blanket Bond, including the riders thereto, issued by defendant to plaintiff on June 25, 1948; that said instrument did not constitute a forged instrument.

2. That plaintiff is not entitled to any relief or declaration of any rights against the defendant.

3. That defendant is entitled to its costs of suit herein in the sum of \$.

The Clerk Is Ordered to Enter This Decree.

Dated May 21, 1957.

/s/ ERNEST A. TOLIN,
Judge. [50]

Affidavit of Service by Mail Attached. [51]

[Endorsed]: Filed June 3, 1957. Entered June 4, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To The Defendant, The Aetna Casualty & Surety Company, and to Your Attorneys, Crider, Tilson & Ruppe:

You, and Each of You, Will Please Take Notice that Torrance National Bank, a national banking association, the plaintiff in the above-entitled action, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 4th day of June, 1957, in favor of the above-named defendant and against the plaintiff, above named, and from the whole of such judgment.

Dated this 6th day of June, 1957.

McLAUGHLIN & CASEY,

/s/ By JAMES A. McLAUGHLIN,
Attorneys for Plaintiff and
Appellant. [52]

Affidavit of Service by Mail Attached. [53]

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items below constitute the transcript of record on appeal to the United

The Aetna Casualty & Surety Company, for court trial.

Mr. McLaughlin: The plaintiff is ready.

Mr. Shallenberger: Ready for defendant, your Honor.

The Court: The court has read your memoranda, so you may let those stand as your opening statement, if you like, or you may amplify them, whichever you prefer.

Mr. McLaughlin: Your Honor, I think that for the time being, in view of the fact the opening statements are in, we can profit by taking the testimony of the witnesses. That would be my view.

With that, I would like to call Mr. Joseph Alden.

JOSEPH R. ALDEN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, please?

The Witness: Joseph R. Alden; A-l-d-e-n.

Direct Examination

Q. (By Mr. McLaughlin): Mr. Alden, where do you reside?

A. 25114 Woodward, Lomita, California. [3]

Q. During the year of 1953, up to about the 4th or 5th of April, were you employed by the Enesco Federal Credit Union? A. I was.

Q. Will you tell us what that organization was?

(Testimony of Joseph R. Alden.)

A. It was a corporation formed under the federal law as a federal credit union.

Q. That was for the benefit of employees of a certain employer, isn't that true?

A. That is true.

Q. What was the name of that employer?

A. The employer was the National Supply Company.

Q. National Supply Company. And Enesco Federal Credit Union had its office in a small building on the premises of the National Supply Company, isn't that right?

A. That is true.

Q. And the general business of Enesco Federal Credit Union or of any of these credit unions is that it is sort of a savings society for the benefit of employees and also makes loans to employees, isn't that right?

A. That is true.

Q. Tell us how long you had worked for that association?

A. Since about the 2nd of June of 1948.

Q. And tell us what your general duties were. What [4] was your title and what were your general duties?

A. My title varied, but I was the general manager of the organization.

Q. Well, you were treasurer, I think, and also as such you were general manager, isn't that right?

A. That is true.

Q. And where did the Enesco Federal Credit Union maintain its bank account?

(Testimony of Joseph R. Alden.)

A. Torrance National Bank in Torrance, California.

Mr. McLaughlin: Mr. Shallenberger, you have seen the signature card, I think?

Mr. Shallenberger: Yes.

Mr. McLaughlin: I have photostats of these. Do you mind if I use the photostats so we don't have to take the County Clerk's?

Mr. Shallenberger: Not at all.

Q. (By Mr. McLaughlin): I show you a photostat of the signature card, and having on the reverse side of the photostat a corporate resolution of Enesco Federal Credit Union indicating who the authorized signers on the account of Enesco Federal Credit Union are.

Now, I ask you if you signed the certification on that as secretary. A. I did.

Q. Also this resolution discloses that Lila M. Alden [5] and Joseph R. Alden were authorized signers. Lila M. Alden was your wife, isn't that right? A. That is right.

Mr. McLaughlin: May we offer this document in evidence as the first exhibit for plaintiff?

The Court: Received.

The Clerk: Plaintiff's 1.

(The document referred to was marked Plaintiff's Exhibit 1 and was received in evidence.)

Q. (By Mr. McLaughlin): I show you another similar resolution and I ask you if again the——

I beg your pardon. This was after April 3rd.

(Testimony of Joseph R. Alden.)

Mr. Alden, I also show you an original of a card dated October 10, 1950, and that indicates that there was an account opened on that date in the name of Enesco Service Fund, does it not?

A. Yes, sir.

Q. And again the signature, the authorized signers on that account were Joseph R. Alden and Lila M. Alden, isn't that right? A. That is right.

Q. Will you tell us what Enesco Service Fund was?

A. That was a personal bank account that I had set up to handle the service that I was rendering to employees of the National Supply Company. [6]

Q. It was your personal account, as distinguished from Enesco Federal Credit Union?

A. That is right.

Q. Were you able to find a photostat of this?

Mr. Shallenberger: If you want to avoid the necessity of having to put in the original documents, it is already in the other file, and I will stipulate that both Mr. and Mrs. Alden were authorized to sign checks on the Enesco Service Fund account at the Torrance National Bank.

Mr. McLaughlin: Thank you very much, Mr. Shallenberger.

And that the card under which this account was opened is dated October 10, 1950?

Mr. Shallenberger: That is fine. If it so dated, I will stipulate to that, yes.

Mr. McLaughlin: Yes. Now, there is another

(Testimony of Joseph R. Alden.)

signature card as to Enesco Service Fund. I think I had better ask Mr. Alden about this.

Q. (By Mr. McLaughlin): Mr. Alden, there is a second signature card dated November 20, 1952. Now, that also relates to that personal account of yours under the name of Enesco Service Fund, isn't that right? A. That card is correct.

Q. And again this adds a new signer to the account, in addition to yourself and Lila M. Alden. You had someone else by the name of Shona Boarts.

A. That is right.

Q. So far as the account was concerned, it wasn't changed so far as the account being a personal account of yours?

A. The account didn't change; just an additional signer.

Mr. McLaughlin: Your Honor, I thought I had—I have up here those two photostats. May I put them in evidence so the record will be complete? They are the photostats of the two cards Mr. Alden has identified.

The Court: Yes.

Mr. McLaughlin: The one dated October 10, 1950, will be the next exhibit, and the one dated November 20, 1952, will be the next.

The Clerk: Plaintiff's Exhibits 2 and 3.

(The documents referred to were marked Plaintiff's Exhibits 2 and 3 and were received in evidence.)

Q. (By Mr. McLaughlin): Now, Mr. Alden, during the year of 1953 and prior thereto you had

(Testimony of Joseph R. Alden.)

been operating a business on the premises where Enesco Federal Credit Union's business was operated, and the business you operated consisted of cashing checks and writing utility money orders in behalf of persons who wanted to pay utility bills through this service, is that right?

A. That is correct.

Q. That was a business that you conducted and you [8] made a certain charge to persons that got that service, and you were permitted to keep that as your own charge, isn't that right?

A. That is right.

Q. That was a business you operated individually, in which Enesco Federal Credit Union got no money or proceeds?

A. That is true.

Q. The cashing of payroll checks for the employees at the National Supply Company was handled on Friday, isn't that right, of each week?

A. Usually on Friday, yes, sir.

Q. Will you explain to the court how you handled the matter of obtaining funds with which to cash those checks of those employees?

A. After banking hours on Thursday I would present a check drawn on the funds of the Enesco Federal Credit Union, signed by myself as treasurer, to the Torrance National Bank. They would give me the amount of cash that was required on the check.

After I had cashed sufficient checks on Friday to redeem that check, I would present the checks, the payroll checks I had cashed, to the Torrance

(Testimony of Joseph R. Alden.)

National Bank and they would return the check to to me.

Q. Now, on the 3rd day of April, or, the 2nd day of April, 1953, which I believe was Thursday, did you present [9] such a check to the teller at the Torrance National Bank in Torrance?

A. I did.

Q. I show you an original and a photostat of that check, and I ask you if that is your signature in the lower right-hand corner over the printed word "Treasurer?"

A. That is my signature. I drew those checks.

Q. There is attached to this check on the upper left-hand corner a little sheet which has indications as to the denominations of currency that you picked up.

Are you able to refresh your recollection as to whether that is correct or not?

A. I would say those sums were correct.

Mr. McLaughlin: Your Honor, may we offer in evidence the photostat of the check that Mr. Alden has just identified?

The Court: Yes.

The Clerk: Plaintiff's—

The Court: It is received.

The Clerk: Plaintiff's Exhibit No. 4.

(The document referred to was marked Plaintiff's Exhibit 4 and was received in evidence.)

Q. (By Mr. McLaughlin): Mr. Alden, on the 2nd of April, it was after 3:00 o'clock when you

(Testimony of Joseph R. Alden.)

got that money at the Torrance National Bank, is that correct? A. That is correct. [10]

Q. And did you put it in any kind of a receptacle?

A. I received the money in a leather briefcase. I did not check the currency. I don't know whether the funds were intact or not, but I received my briefcase supposedly containing that amount of currency.

Q. Tell us where you went and what happened after that.

A. I left the bank, I would approximate about 3:25 or 3:30 and headed toward my office through an alley and down a couple of streets. I was about a half a block away from the main office of the National Supply Company when I was attacked and robbed of the money.

Q. Now, this was the money that you were taking back to Enesco Federal Credit Union to use in cashing those checks? A. That is true.

Q. You never saw that money after these robbers took the money from you?

A. I never saw the money since then.

Mr. McLaughlin: I have no further questions of this witness.

Mr. Shallenberger: What is the date on that check again, April——

Mr. McLaughlin: 3rd.

Mr. Shallenberger: April 3rd of 1953?

Mr. McLaughlin: '53.

Mr. Shallenberger: Thank you. [11]

(Testimony of Joseph R. Alden.)

Cross Examination

Q. (By Mr. Shallenberger): For approximately how long prior to April 3rd or April 2nd of 1953 had you been in the practice of securing money at the Torrance National Bank with which you carried on your check-cashing service?

A. I would say sometime between November of 1948 or January or February of 1949. I couldn't be certain as to that point.

Q. In any event, it is true, isn't it, that at some point you arrived at a situation where, in connection with your activities, you needed to have more money available for your check-cashing activities than was on deposit in the Enesco Federal Credit Union's account?

Mr. McLaughlin: Just a minute. I object to that on the ground it calls for a conclusion and also is—well, it calls for a conclusion.

The Court: Read the question.

(The question was read.)

The Court: Overruled.

The Witness: May I answer?

The Court: You may answer.

The Witness: Yes.

Q. (By Mr. Shallenberger): And when that time arrived, did you speak to any of the officers at the Torrance National [12] Bank with respect to that matter, sir? A. I did.

Q. And can you tell us at this time who it was that you spoke to about the matter?

A. I cannot be certain, but I spoke to the

(Testimony of Joseph R. Alden.)

executive officers, whether singly or jointly I don't know. But it was Mr. Post and Mr. Dinninger. I don't recall at this time which one I spoke to or whether I spoke to them both.

Q. It was either one or both?

A. That is true.

Q. Could you tell us the capacities of those men at the Torrance Bank at that time?

A. As I understand, Mr. Wally Post was the president of the Torrance National Bank. Mr. Robert Dinninger was the vice president and general cashier.

Q. Isn't it true that you explained to them that you needed more money than was on deposit in the Enesco Federal account, that is, the Enesco Federal Credit Union account, and asked their permission to draw a check on that account for an amount which was in excess of what was on deposit?

A. That is correct.

Q. And in that connection did you not also discuss with them and arrive at the understanding with them—strike that.

Isn't it true that you also discussed with them, and the [13] arrangement was arrived at whereby you would give this check for the amount desired to the bank, made out payable to the bank, drawn on the Enesco Federal Credit Union account, with the agreement that that check would be returned to you on the following day, after you brought back to the bank enough of the endorsed checks so that you could deposit them into the Enesco Service

(Testimony of Joseph R. Alden.)

account and then draw a debts payable to the Torrance National Bank?

Mr. McLaughlin: Your Honor, we object on the ground it calls for a conclusion and it is compound. There are so many questions there that I don't think the witness could intelligently answer it.

Maybe I will make a stipulation.

The Court: Sustained on the ground it is compound.

Mr. Shallenberger: You may make a stipulation to what effect, sir?

Mr. McLaughlin: I will offer to stipulate that this matter was handled—that on Thursdays after 3:00 o'clock Mr. Alden would bring a check, similar to the one which is in evidence, to the Torrance National Bank and he would be given currency in the denominations requested by the Torrance National Bank on that day after 3:00, and that the next day he would bring back checks in an amount sufficient to cover the thirty thousand, or whatever the amount of his check was, which would be returned to the bank, and at that time he would [14] pick up this check that he had left with the bank.

Now, does that help you?

Mr. Shallenberger: That doesn't quite go into all the details. Maybe I can draw it out point by point and then establish it was arrived at by a conversation. I think that you don't handle all the details of it in your stipulation, is my only point.

(Testimony of Joseph R. Alden.)

The Court: I think it would be helpful to have it from the witness.

Mr. McLaughlin: All right.

The Court: We are not going to rush you. I might find it necessary to close for the day at 4:00 o'clock, but we have all day tomorrow, all day Friday.

Mr. Shallenberger: I saw Mr. Alden grimace.

Q. (By Mr. Shallenberger): I think we will be finished with you by then, anyway, Mr. Alden.

You had built up a system for the years prior to April of 1953, is it——

Mr. Shallenberger: Is that right, counsel?

Mr. McLaughlin: Yes.

Mr. Shallenberger: Yes.

Q. (By Mr. Shallenberger): ——prior to 1953, whereby you would take a check in a designated amount into the bank on Thursday, wouldn't you, sir? A. That is true. [15]

Q. All right. Now then, in the earlier stages when you were doing this, the amount of the check was \$10,000.00, is that right, sir?

A. It was even lower than that in the beginning. It eventually came to that figure.

Q. Later it became ten thousand and then eventually twenty thousand and eventually thirty thousand, is that correct? A. That is true.

Q. So that by April of 1953 it was up to thirty thousand.

A. That is true.

Q. As part of this system that was being used,

(Testimony of Joseph R. Alden.)

this check would actually be delivered on Friday, but would always be dated—the check would be delivered to the bank, but would be dated as of the next Friday? A. The following day, yes.

Q. Yes. And, actually, your practice was to bring the check in during banking hours and to leave with the teller who handled your transaction a list of the denominations of currency you desired, is that correct? A. That is correct.

Q. And then you would come in on that Thursday after the bank had closed and pick up the currency itself. A. That is correct. [16]

Q. Then you, of course, would go back and then during Friday, during that day you would carry on your check-cashing activities, is that correct, sir? A. Right.

Q. Then you would return to the bank on Friday after you had cashed a sufficient number of checks so that they would total \$30,000.00, and you would deposit those checks the Enesco Service Fund account? A. Correct.

Q. At that time, after having made that deposit, you would then make out a debit slip on the Enesco Service Fund, which was payable to the Torrance National Bank? A. Correct.

Q. Upon giving this debit slip in the amount—to the teller, she would then return to you the check which you had given her on the previous day?

A. That is correct.

Q. And this was the practice that had been

(Testimony of Joseph R. Alden.)

followed for at least two or three years prior to April of 1953? A. That is correct.

Q. And at the time that you initiated the policy of taking out more money than you had in the account of the Enesco Federal Credit Union, you discussed the matter with the bank officers, one or both of them?

Mr. McLaughlin: I object to that on the ground that [17] assumes facts not in evidence. I don't think counsel meant to, but he said "more money than you had in the Enesco Federal Credit Union." You mean more money than the Enesco Federal Credit Union had?

Mr. Shallenberger: I didn't mean that.

Mr. McLaughlin: I didn't think you did.

Mr. Shallenberger: I will reframe the question.

Q. (By Mr. Shallenberger): At the time you initiated this practice and started withdrawing by means of this check more money than there was in the Enesco Federal Credit Union account, you discussed that matter with either Mr. Post or Mr. Dinninger? A. I did.

The Court: Who were they?

Mr. Shallenberger: They were the president and executive vice president—

The Court: Let him answer.

Mr. Shallenberger: Pardon me.

Q. (By Mr. Shallenberger): Who were they?

A. They were the president and vice president and cashier of the Torrance National Bank.

Q. And in the discussion with the gentleman or

(Testimony of Joseph R. Alden.)

gentlemen, that is, either Mr. Post or Mr. Dinninger, or both of them, you arrived at this system which you have just described in your testimony?

A. That is true.

Q. That system was then approved by either Mr. Post or Mr. Dinninger, or both, is that correct?

Mr. McLaughlin: That is objected to as calling for a conclusion. I am not fighting the fact that—I will even offer a stipulation. I don't like to have the witness testify to conclusions, that is the thing.

The Court: He testified to a conclusion when he testified to the positions which they held. But I take it that is not in dispute.

Mr. Shallenberger: No. And I gather, although you don't wish him to testify to it, you do stipulate that they did approve the system as outlined?

Mr. McLaughlin: Yes. That is just what I offered to stipulate to.

Mr. Shallenberger: Fine. Thank you.

Q. (By Mr. Shallenberger): As one additional factor in this system that I think we forgot, there was always a charge made in connection with these weekly transactions, was there not, Mr. Alden?

A. Yes, there was a charge every week.

Q. And by the time that you were withdrawing \$30,000.00 a week, the charge was \$5.00, was it, sir?

A. I can't be positive, but I think it was.

Q. In any event, the charge had gone up as the amount [19] of money that you were withdrawing went up, is that correct, sir?

A. That is true.

(Testimony of Joseph R. Alden.)

Q. And that also was a matter which had been discussed with either Mr. Dinninger or Mr. Post?

A. That is correct.

Q. Now then, the amount of discharge—let's just make it easier—let's confine it to the time period when you were taking out \$30,000.00, that then the amount of this charge, which was then \$5.00, was actually being paid by the funds in the Enesco Service Fund account? A. That is right.

Q. And that was the invariable practice, was it, sir? A. That is correct.

Q. As a matter of fact, the amount of the debit that you would make on the Enesco Service Fund account always included the amount of your check, which at the end was \$30,000.00, plus this additional charge which at that time was \$5.00, is that correct, sir? A. That is right.

Q. Now then, in connection with the Enesco Service Fund account, isn't it true, Mr. Alden, that you told either Mr. Post or Mr. Dinninger, or both of them, that you were setting up this account which was your own account?

Mr. McLaughlin: Just a minute. All right. I have no [20] objection.

The Witness: May I please hear the question?

(The question was read.)

The Witness: I informed them at the time I desired to open the account that because of the objections of the Federal Credit Union auditor I was closing out my account with the Enesco Fed-

(Testimony of Joseph R. Alden.)

eral Credit Union, and I desired to open it up at the Torrance National Bank.

Q. (By Mr. Shallenberger): And you told them it was your own operation, did you not?

A. Yes.

Q. And it was not connected with the Enesco Federal Credit Union? A. I did.

Q. Now then, in connection with the setting up of this arrangement so that you could get this money for the check-cashing activities, you also told either Mr. Post or Mr. Dinninger, or both of them, that you were taking or you were using this money to carry on your own check-cashing activity, did you not, sir? A. I did.

The Court: Was there a charge made to the person whose check was cashed?

The Witness: Yes, sir.

The Court: Who received that charge? [21]

The Witness: I did, sir.

The Court: You mean you personally?

The Witness: I paid all expenses and I received any profit derived.

The Court: Did you ever talk to anyone in a superior position at the Credit Union about it?

The Witness: I did, sir.

The Court: I will leave that for counsel to develop.

Mr. Shallenberger: I didn't hear the last.

The Court: I said I would leave that subject for counsel to develop, if he so desires.

Mr. Shallenberger: Might I have just a moment?

(Testimony of Joseph R. Alden.)

I think I am about finished, but I would just like to check and make sure I have everything covered.

The Court: Surely.

Q. (By Mr. Shallenberger): One other thing, Mr. Alden.

During the course of carrying on this operation in the manner we have described you would, for example, start at the \$10,000.00 plateau for a certain period, and then go up to the \$20,000.00 for a certain period and then go up to the \$30,000.00, is that right, sir? A. That is right.

Q. Every time you increased the amount that you were withdrawing you would always discuss that with either Mr. Post or Mr. Dinninger, or both of them, and in each case they [22] specifically approved of that? A. That is true.

Q. And with respect to the check which you would leave with the bank, when it was returned to you on Friday there was never any stamp or anything to indicate that it had been run through any of the bank's records, was there, sir?

A. I never examined them, but then I don't think that there was.

Q. As a matter of fact, the arrangement was that they were not to put it through the bank's records, but instead were to return it to you on the following day?

Mr. McLaughlin: Objected to as calling for a conclusion.

Q. (By Mr. Shallenberger): Well, in your discussions with Mr. Post or Mr. Dinninger, or both

(Testimony of Joseph R. Alden.)

of them, one of the three of you stated, to which it was assented by the others, that the check would be returned to you the following day and would not be run through the bank's records?

A. It was my understanding that the check would be returned to me upon presentation of sufficient endorsed pay-checks to redeem it.

Q. That was covered in your discussions with Mr. Post or Mr. Dinninger? A. Yes.

Mr. McLaughlin: Objected to as calling for a conclusion. I am a little slow, but the answer was fast. In other words, [23] he is being asked if these things were so, and he just says "Yes," and I think we ought to have the substance of the conversation, if it was said.

The Court: Of course, it is cross examination. It would be more helpful if we could have the substance of the conversation.

Do you want to probe for a little more detail?

Mr. Shallenberger: Well, all right. I will just ask it this way.

Q. (By Mr. Shallenberger): During the times when you discussed this with Mr. Dinninger or Mr. Post, or both of them, didn't you in substance say, or didn't they in substance say, "And this check that you bring in on Thursday, we will return it to you on Friday when you make the debit on the service fund account, and the check will not be run through the bank records?" Was that just the substance of the conversation? Isn't that a fair statement as to its substance?

(Testimony of Joseph R. Alden.)

A. Well, I can't recall the exact conversation. I would say that—I had been in the practice of presenting this check, so when it came to the point which I had to have more money than was on deposit in the Credit Union account, they said, "Well, just leave the check here and when you bring in the checks we will—the payroll checks—we will return you your regular Enesco Federal Credit Union [24] check."

I don't know if that is the information needed. That is basically what happened.

Q. The checks that you used on these occasions were unnumbered checks, were they not, sir?

A. That is true.

Q. Of course, they were unnumbered checks printed with the Enesco Federal Credit Union name on them? A. That is right.

Q. And did you use unnumbered Enesco Federal Credit Union checks for other purposes besides that that we have been discussing?

A. At times during the course of business of the Enesco Federal Credit Union, where I should happen to spoil a check, which would void a particular number, I would use a blank check and renumber it with that particular number.

Q. Renumbering it by hand, I suppose?

A. By hand or by a numbering machine.

Mr. Shallenberger: There is no question, is there, counsel, but that on the particular occasion here, which is April 2nd of 1953, the balance of the

(Testimony of Joseph R. Alden.)

Enesco Federal Credit Union that you were using Enesco Federal Credit Union unnumbered checks for cashing these checks on Thursday?

A. The subject never came up.

Q. Your answer is you never told anybody?

A. No.

Q. Coming back to the time Mr. Schultz was present and you stated something was said about continuing the activities, let me ask you what was said as to why those activities could not be continued?

A. I couldn't be exactly sure on that. That has been too long ago. I know for years prior to that meeting the federal auditor was in disapproval of it.

Q. Don't you also know at that meeting it was said you couldn't carry that on and use any Enesco Federal Credit Union funds in connection with it?

A. I don't think the subject of Enesco Federal Credit Union funds was even brought up. I couldn't be positive, but I don't recall the subject was ever brought up.

Q. Was there any reason why you would come to the bank after, we will say, September of 1952, to cash, to get money for payroll checks that you used Enesco Federal Credit [28] Union unnumbered checks for, instead of a numbered check?

Mr. Shallenberger: Could I have that question?

(The question was read.)

The Witness: I always used these particular checks.

(Testimony of Joseph R. Alden.)

Q. (By Mr. McLaughlin): When did you start using unnumbered checks on this check-cashing activity? A. I would say probably about 1950.

Q. Where did you have them printed?

A. Automatic Printing Company.

Q. Did you ever disclose to any officers of the Enesco Federal Credit Union you had such supply of checks unnumbered?

A. The chairman of the supervisory committee at the time approved the invoice which paid for them. He also saw them on the supply inventory.

Q. Who was that?

A. That was Mr. James K. Lee.

Q. Did he see those checks as being unnumbered? A. Yes, sir.

Q. Was there a discussion as to what you were to use them for? A. No, not that I recall.

Q. What was the reason that you used unnumbered checks instead of numbered ones?

A. I used them to replace checks that would be voided—I used primarily not the checks, but the journal voucher [29] behind them, where I needed more than one copy of a journal voucher—

Q. I wanted to know why you used them in this check-cashing activity.

A. I don't understand the question. Will you repeat it?

Q. Why did you use unnumbered checks to get this money from the bank for your check-cashing activities?

(Testimony of Joseph R. Alden.)

A. Because the Federal Credit Union law does not permit a credit union to cash checks.

Q. In other words, the credit union had no power under the law to have a check-cashing activity?

Mr. Shallenberger: I object to that as calling for a conclusion of the witness.

The Court: Sustained.

Mr. McLaughlin: I asked him why he did it.

The Court: You can ask him why he did it, which would call for his own reason, and not for the legal considerations which might or might not have——

Q. (By Mr. McLaughlin): You stated the reason you used the unnumbered checks was because the federal law did not permit the cashing of checks as an activity of a credit union, is that right?

A. That is right.

Q. Was it for the purpose, in your mind was your [30] purpose to conceal this check-cashing activity from somebody, by using unnumbered checks?

A. Not specifically to conceal it, but just as a matter of convenience.

Q. Well, whose convenience?

A. The credit union.

Q. In other words, for the convenience of the Enesco Federal Credit Union?

A. That is right.

Q. Now, you stated that a Mr. Lee knew about the invoices on these unnumbered checks. Did you

(Testimony of Joseph R. Alden.)

ever tell Mr. Lee that you were using unnumbered checks for the purpose of getting money to cash your payroll checks?

A. I didn't discuss with him what I used any checks for.

The Court: What was the convenience that the credit union received from the use of unnumbered checks in these transactions?

The Witness: Mr. Schultz, the federal auditor, was objecting to it. The previous board of directors had instructed me that if I could make arrangements to cash checks by which the credit union was benefiting, that whatever arrangements I made were satisfactory.

But then by using a regular numbered check I would either have to show them as void checks and destroy them, so I just used unnumbered checks, which I didn't have to account for on [31] the books, because, according to our bookkeeping system, we had to account for each number.

Q. (By Mr. McLaughlin): Mr. Alden, was that discussion had, that you just related, with any officer of the Enesco Federal Credit Union?

A. It seems that it was, but then I couldn't be positive.

Q. Well, do you have any idea as to whom you had such a discussion with?

A. I would say probably Mr. Charles Shepherd, Mr. Bernard Hadden, probably Mathew La Beau. I couldn't be positive.

(Testimony of Joseph R. Alden.)

Q. Tell us what year that discussion took place and who was present, if you know.

A. I couldn't say. It was sometime between the period of 1949 and 1952, and I wouldn't have the slightest idea who might have been present.

Q. Now, is it your testimony during 1949 you were using unnumbered checks to get money out of the account of the Enesco Federal Credit Union?

A. I couldn't be specific as to the date. I would say that would be right. I can't be absolutely positive.

Q. In 1949 were you overdrawing on the account of the Enesco Credit Union to use in any check-cashing activities?

A. I couldn't say, without looking at the credit union [32] or the bank records.

Q. Do you know whether you were in 1950 or '51?

A. I would say I probably was, but I couldn't be certain. I don't know the exact date because I wouldn't know I was overdrawn the date this particular check came into the picture.

Q. You mean you wouldn't know whether Enesco Federal Credit Union was overdrawn?

A. That is correct.

Q. You kept their records, you knew what money they had, didn't you?

A. At the end of each month; whenever I made a financial statement.

Q. After this discussion in 1952 that you mentioned, where Mr. Schultz told you that the check-

(Testimony of Joseph R. Alden.)

cashing activity could not be a part of Enesco's business, what change, if any, did you make in the operations of check-cashing anywhere?

A. The only change I can recall is that I transferred my Enesco Service Fund account from an individual account in the Enesco Federal Credit Union to a private account in the Torrance National Bank.

Q. Now, you say you had an Enesco Federal Credit Union—or Enesco Service account with Enesco Federal Credit Union before then?

A. That is correct. [33]

Q. What you mean is that you mingled and used money in an account that was sort of an account that you kept, a record showing what moneys you were debited with, isn't that right?

A. That is correct.

Q. That was on account of these check-cashing activities, wasn't it? A. That is correct.

Q. When you were told that could no longer be a part of the business in any way of the Enesco Federal Credit Union, you opened the account or you shifted this account over to the Torrance National Bank under the name of Enesco Service Fund, didn't you? A. That is right.

Q. Now, when you did that, you didn't draw any of these checks that you would get money on the Enesco Service Fund for use in check-cashing, did you?

The Witness: May I hear that question?

(The question was read.)

(Testimony of Joseph R. Alden.)

Q. (By Mr. McLaughlin): That isn't quite clear.

A. I made a share withdrawal. This was a share account in the Enesco Federal Credit Union. I made a share withdrawal from my total account and turned around——

Q. You closed it out with the Enesco Federal Credit Union? [34]

A. I closed it out with the Enesco Federal Credit Union and transferred that money to the Torrance National Bank.

Q. And this account you opened under "Enesco Service Fund?"

A. Yes.

Q. Did you ever cash any checks or draw any checks on Enesco Service Fund, to get this money for payroll?

A. No, sir.

Q. Why didn't you use that account?

Mr. Shallenberger: I will object as being immaterial.

The Court: Sustained.

Mr. McLaughlin: Your Honor, he has opened up a lot of questions here, and this witness, of course, is not too willing a witness on these particular subjects. I think it is very proper in this case to find out whether or not this man's charges against the bank officers, that they knew, and that the officers of Enesco knew he was handling this this way, I think we have a right to go into it. It is not a natural transaction.

The Court: I will set aside the ruling. You may inquire.

The Witness: What was the question?

(Testimony of Joseph R. Alden.)

(The record was read.)

The Witness: There was insufficient funds in the account. [35] It only ran a balance of around one to three thousand dollars.

Q. (By Mr. McLaughlin): When you would bring the checks you had gotten in the cashing of the employees' checks back to the bank, you would deposit them in the service fund account, wouldn't you? A. That is right.

Q. The balance would be much more than you just mentioned, wouldn't that be true?

A. That is true.

Q. And you were during the last several months before April 3rd overdrawing the Enesco Federal Credit Union account, were you not?

A. That is true.

Q. Had the bank told you you couldn't overdraw your own personal account?

A. No, they hadn't.

Q. Now, you testified you told some officer of the bank that the Enesco Service Fund was your personal account, as distinguished from an auxiliary account of the Enesco Credit Union.

Will you tell us whom you told and when?

A. I can't tell you the exact date. I told them at the time I was opening the account, either Mr. Dinninger or Mr. Post, that was my account I handled my money order and check-cashing [36] service through.

Q. That is the account you told them you were

(Testimony of Joseph R. Alden.)

handling your check-cashing and money orders through? A. Yes.

Q. Did you ever tell them you were drawing funds of the Enesco Federal Credit Union on checks of the Enesco Federal Credit Union for that purpose?

Mr. Shallenberger: I will object on the ground it is an attempt to impeach his own witness.

Mr. McLaughlin: He opened the subject, your Honor. He went way beyond my examination.

I am in the position where the things he has asked this witness I have to find out about, because he said the witness has charged the bank and the officers and everybody with knowledge of the fact he was using this method of getting money with their permission, and I think the only way we can get at this is to inquire into it.

The Court: Overruled. Read the question.

(The question was read.)

Q. (By Mr. McLaughlin): For the purpose of cashing your checks.

A. Did I ever tell the officers of the bank, do you mean, Mr. McLaughlin?

Q. Yes.

A. I told them the purpose. I told them I needed this [37] money to cash checks. They saw the check that I was using. I didn't tell them this was a check of the Enesco Federal Credit Union.

I said, "This is—I want to draw \$30,000.00 on this check."

(Testimony of Joseph R. Alden.)

Q. You presented a check on the Enesco Credit Union on every occasion, didn't you?

A. That is correct.

Q. And you had told the bank before that you were opening up an Enesco Service Fund account to handle your check-cashing?

A. That is right.

Q. You said you told either Mr. Post or Mr. Dinninger, when you opened up the Enesco Service Fund, that was the account to be used in check-cashing, is that right?

A. That is right.

Q. You did cash checks on the Enesco Federal Credit Union frequently for cash, for the use of the Enesco Federal Credit Union, didn't you?

A. That is right.

Q. On the date that you would bring this check, on Thursday, to the bank, was there any reason why you waited until after 3:00 o'clock to pick up the money?

A. Yes, there were a couple of reasons. One, for the protection of the money. The other, because up until 3:00 [38] o'clock the bank wouldn't know whether they had that much money available in cash to give to me.

Q. Who stated that latter reason to you?

A. Well, just a common discussion. I can't say whether it was Mr. Dinninger or Mr. Post. But it was a mutual agreement, until the bank closing hours they didn't know whether they would have sufficient—that sufficient amount of currency to give to me.

(Testimony of Joseph R. Alden.)

Q. Wasn't the reason why you got the currency after 3:00 o'clock was because you personally did not wish that to be entered on the bank's records as an April 2nd, or as a Thursday transaction?

A. I personally didn't care how the bank entered it.

Q. If the bank entered it on its records, did you know whether or not it would then show on the ledger sheets that would be returned to the Enesco Federal Credit Union, that you had drawn that money out?

A. If it had shown on the ledger sheets, it would have been a matter of indifference to me. I would have had a deposit the next day to cover it, anyway.

Q. Did you ever on any occasion have any of the ledger sheets show you had drawn out any money for the use of these week-end check-cashing activities?

A. I think there have been occasions, but I couldn't be positive without examining the bank statements. [39]

Q. Those occasions were prior to the time that you were told to disassociate that activity, isn't that right?

A. Oh, that I couldn't say without examining the records.

Q. In each instance that you cashed a check and you picked up that currency on Thursday afternoon, you came back and got the check the next day.

A. The next day or Saturday, when the bank was open on Saturday.

(Testimony of Joseph R. Alden.)

Q. You picked up the check so it wouldn't be returned as one of the checks that had been cashed by the Enesco Federal Credit Union, isn't that right?

A. That is correct.

Q. Was there any reason why you didn't want it to appear and be returned as one of the checks?

Mr. Shallenberger: I will object to that on the ground it is assuming facts not in evidence.

Mr. McLaughlin: I will withdraw the question.

Q. (By Mr. McLaughlin): If you can, will you please tell us the time that you told either Mr. Post or Mr. Dinninger that you were getting these \$30,000.00 sums for use in your personal business of check-cashing?

A. Well, that would be a hard question to answer because they knew that I was cashing checks on my own personal—as my own personal business from the time I inaugurated, which was in the fall or the winter of 1948 or the spring of [40] 1949.

They knew my check-cashing activity was being conducted as my personal business at that time.

Q. And they knew at that time——

A. That was only two or three thousand dollars at that time.

Q. They knew at that time that it was with the consent of the Enesco Federal Credit Union that you were carrying on that activity, didn't they?

A. That is true.

Q. What I want to know is, when you told them after this discussion with Mr. Schultz, telling you that had to be disassociated, when did you tell

(Testimony of Joseph R. Alden.)

Post or Dinninger that you no longer were carrying that on with the consent of the Enesco Credit Union?

A. I never told them, because that situation never existed. It was Mr. Schultz that disapproved, not the board of directors of the Enesco Federal Credit Union.

Q. Did you ever come to either Mr. Post or Mr. Dinninger after you heard from Mr. Schultz and state, "Now, I am carrying this on as my own independent activity and I am not getting any sponsorship or funds from the Enesco Federal Credit Union?" In substance, did you ever say anything like that to either of them?

A. No, because that situation never existed. [41]

Q. I just want to know whether you did or not.

A. I didn't.

Mr. McLaughlin: All right. I have no further questions.

Recross Examination

Q. (By Mr. Shallenberger): Did I hear correctly that sometimes you wouldn't come back to redeem these checks until Saturday?

A. That is true. It all depended on the pressure of business.

Q. And whenever that would occur, why, you would follow the same procedure of getting the check back from the girl after making your deposit to the service fund account and giving the debit slip, and so forth, is that right?

A. That is correct.

(Testimony of Joseph R. Alden.)

Q. And you did tell Mr. Post and Mr. Dinninger that this money was being used by you in your check-cashing business, didn't you, sir?

A. Certainly.

Mr. Shallenberger: That is all I have.

Redirect Examination

Q. (By Mr. McLaughlin): I have only one question here.

When did you make that statement, Mr. Alden?

A. The statement I was using these funds in my own check-cashing activity? [42]

Q. Yes.

A. When I first went to them to discuss the possibility of securing funds, and to cash checks.

I told them at the time that the board of directors had authorized me to cash checks, because they didn't feel they could afford to pay me the salary they felt I was entitled to. If I could cash checks and pick up a little extra money, that was all right with them.

Q. All I wanted was the year, please.

A. I would say '48 or '49.

Mr. McLaughlin: No further questions.

Mr. Shallenberger: Might I ask one more, your Honor?

The Court: Yes.

Recross Examination

Q. (By Mr. Shallenberger): In that connection, didn't you also have discussions with Mr. Post or Mr. Dinninger, even as late as 1953 and prior to

(Testimony of Joseph R. Alden.)

April 2nd and April 3rd of 1953, in which during the course of the discussion you told them about the fact that this money was being used in your own personal check-cashing activities?

A. I wouldn't say I specifically told them. That is, it was a matter of common knowledge. You don't conduct a business for four years without people knowing what you are doing, to my way of thinking. [43]

Q. Surely. I mean, didn't the point come up during the early part of 1953, when you had under consideration possibly making some other type of arrangement?

A. Because of the antagonism of the federal auditor, I was desiring to make a change in the method I was conducting business, and I discussed it with them at that time.⁵

Q. You discussed that with Post and Mr. Dinninger?

Mr. McLaughlin: I think the answer so far is not intelligible. It is a conclusion. I move to strike it. If there is a discussion, I think we should have the words.

The Court: Let's have it read.

(The question was read.)

Mr. Shallenberger: Now I think it is my next question to bring out what the discussion was insofar as it relates to the point.

Mr. McLaughlin: I will withdraw the motion. The main thing was it didn't tell anything yet.

(Testimony of Joseph R. Alden.)

Mr. Shallenberger: That is true. I go along with you.

Q. (By Mr. Shallenberger): During the course of this discussion—we don't want to go into the whole business, Mr. Alden,—isn't it true that you told again Mr. Post or Mr. Dinninger, or both of them, that this money that you were getting was being used by you in your own check-cashing activities? A. That is correct. [44]

Q. You may not have said it precisely the way I put it, but you did say that during the course of these discussions, in that substance, is that right, sir? A. That is right.

Mr. Shallenberger: All right.

Redirect Examination

Q. (By Mr. McLaughlin): In view of that, I would like to ask a couple of questions. This is important.

Mr. Alden, you have been asked whether during the early part of 1953 you told Mr. Dinninger or Mr. Post that the money you were getting on these Enesco Federal Credit Union checks was being used by you in your personal check-cashing activities.

Please tell us when that discussion took place in 1953.

A. I would say practically any Friday—any Thursday you might want to pick out, because I discussed these things with them practically every week.

(Testimony of Joseph R. Alden.)

Q. Tell us what you said on any discussion you remember in 1953. Tell us what you told them.

A. The big discussion was primarily to find different methods of securing the money.

Q. That doesn't tell us anything. I am asking you to give the substance of the words you used in telling Mr. Post or Mr. Dinninger that this money was being used by you in [45] your personal check-cashing activities, as distinguished from an activity of the Enesco Federal Credit Union?

A. In the particular time you specify, I can't say I said it was my personal activity, because they knew it was my personal activity, in the beginning.

Mr. Shallenberger: I move to strike the part "because they knew" as a conclusion and not responsive.

The Court: Granted.

Mr. Shallenberger: I have no further questions. Just a minute, please.

Recross Examination

Q. (By Mr. Shallenberger): These discussions in early '53 with Mr. Post or Mr. Dinninger related to the fact that you and either Mr. Post or Mr. Dinninger, or both of them, were trying to find another way to carry on your check-cashing activities, is that right, sir? A. That is right.

Q. And of necessity during those conversations it would be brought up as to the different possible

(Testimony of Joseph R. Alden.)

methods that might be adopted for carrying the check-cashing activity on, is that right, sir?

A. That is right.

Q. Among those was thought up the idea that you might be made an employee of the bank, and various schemes such as that were discussed, is that right?

A. That is true. [46]

Mr. Shallenberger: That is all.

Mr. McLaughlin: I am sorry, your Honor, but these are new subjects every time.

The Court: I am not stopping you.

Mr. McLaughlin: I know, but I really feel——

Mr. Shallenberger: You are acting very lawyer-like.

Redirect Examination

Q. (By Mr. McLaughlin): Mr. Alden, what was said at these discussions as to why anyone was trying to find a new method of financing your check-cashing activities?

A. I had informed the bank that the government auditor was not particularly satisfied with the idea of me cashing checks——

Q. Let's stop there. Go ahead and finish your answer; go ahead.

A. I have no further answer.

Q. All right. Now, when did you make that statement to the bank and to whom did you make it?

A. That is difficult to answer because from the time that Mr. Schultz became aware I was cashing checks he openly expressed his disapproval of it for several years, and from the time that he ex-

(Testimony of Joseph R. Alden.)

pressed his disapproval I was constantly trying to find some other way to handle it that would meet with his approval. [47]

Q. I am not asking what you were trying to do. You said there were discussions with the bank. I want to know when those discussions took place, when you were discussing with them of finding another way.

A. From the time Mr. Schultz expressed his disapproval, is the only way I could answer that, because I can't give any specific dates any time that entered my mind.

Q. Who did you discuss that with in the bank?

A. Mr. Post and Mr. Dinninger.

Q. Tell us what suggestions were made by anybody, as to how this could be handled.

A. We suggested delivery of the funds from the bank to the credit union office, putting me on the payroll as a bank messenger or an outside collector, having the bank deliver the money from the California Bank in Los Angeles down to my office and charging it through the—I presume charging it through the Torrance National Bank.

There were a number of different discussions held at various times and different methods discussed.

Q. When was the first one? Let's get them down in order.

A. I can't pick that up. That has been too long ago.

Q. What year was the first discussion?

(Testimony of Joseph R. Alden.)

A. I would say probably 1949 or 1950.

Q. Who was present at that time? [48]

A. Well, myself and one of the bank officers or maybe both of them; I can't tell you.

Q. What was said with respect to any plans on that occasion? A. I couldn't tell you that.

Q. When is the first time you remember when something was said?

A. I can't remember any specific detail of any particular discussion. These were discussions that were going on constantly.

Q. Did any of the bank officers say to you that you had no right to be taking this \$30,000.00 on the Enesco Federal Credit Union account weekly?

A. No, sir.

Q. Did you tell them you had no right to be doing it? A. No, sir.

Q. What was said as to why you needed another method then?

A. I told them that the federal examiner did not approve of it, and I was trying to find some more satisfactory arrangement to handle the thing.

Q. Did you tell them that the officers of the Enesco Federal Credit Union didn't approve of it?

A. I don't think any of the officers didn't approve of it.

Q. Did you tell them any of the officers ever told you [49] you couldn't use the funds?

A. I did not.

Mr. McLaughlin: No further questions.

(Testimony of Joseph R. Alden.)

The Court: What was it that the auditor was disapproving of?

The Witness: The fact that Federal Credit Unions are limited to accepting shares and making loans to their members, and any other activity, regardless of what it might be, should not be conducted in a Federal Credit Union office.

The Court: Did the auditor ever object to your use of credit union funds for this temporary borrowing?

The Witness: So far as I know, he didn't realize it was going on. You see, by the use of these unnumbered checks, they were destroyed, and they never showed up on the books.

When I started the later date of using unnumbered checks, at the times when the checks were put through the bank they were just shown as a charge against the petty cash fund, and he never questioned the fact the petty cash fund sometimes went up to \$5,000.00 or so and was repaid the next day, because the credit union has authority to make petty cash loans of that size; a change in funds, I should say, into a petty cash fund.

The Court: Anything further?

Mr. Shallenberger: Nothing further.

Mr. McLaughlin: I would like to fix the fact that petty [50] cash funds—I think Mr. Alden will admit that was the original method he used before he started the method of bringing the check in and getting the cash.

(Testimony of Joseph R. Alden.)

The Witness: That is true, and it could be continued that way from then on.

Mr. McLaughlin: I move to strike the last part as a conclusion, "it could be."

The Court: Granted.

Mr. McLaughlin: I have no further questions.

The Witness: May I be excused as a witness?

The Court: This witness wishes to be excused.

Mr. Shallenberger: He may be excused, so far as I am concerned, your Honor.

Mr. McLaughlin: Yes.

The Court: You may be excused.

The Witness: Thank you, sir. I will be available for call if I am needed.

(Witness excused.)

Mr. McLaughlin: I would like to call Mr. Hood.

WILLIAM A. HOOD

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, please?

The Witness: William A. Hood. [51]

Direct Examination

Q. (By Mr. McLaughlin): What is your occupation, Mr. Hood?

A. I work in the production control office.

Q. Of the National Supply Company?

A. Correct.

(Testimony of William A. Hood.)

Q. You are an officer and a director of the Enesco Federal Credit Union, also, are you not?

A. That is correct.

Q. How long have you been a director of the Enesco Federal Credit Union?

A. I was elected to the board in 1952.

Q. And you have been a director continuously since that time? A. That is correct.

Q. Do you hold any office with that association?

A. At the present time I am the president.

Q. Incidentally, did you bring the minute book with you? A. Yes, I did.

Q. I will hand you the minute book——

A. No, that is not the minute book. I am sorry. It is the bylaws.

Q. I notice this is in two volumes. I think the one that is through '50 I will ask you about first.

Would you turn to the minutes of September 30, 1948, first, Mr. Hood? A. September 30, 1948?

Q. Yes. A. (Witness complies.)

Mr. Shallenberger: I haven't seen any of these minutes, Mr. McLaughlin.

Mr. McLaughlin: Well, there are excerpts of them in the exhibit file you looked at before. If you would like to stand up here, Mr. Shallenberger, I will let you see these,——

Mr. Shallenberger: All right.

Mr. McLaughlin: ——if you don't mind, at the same time.

Mr. Shallenberger: No. That is quite all right.

(Testimony of William A. Hood.)

Q. (By Mr. McLaughlin): Did you find that, Mr. Hood?

A. Is that the 30th of September, 1948?

Q. Yes. A. Yes.

Q. Would you read from that book as to a resolution regarding Joseph Alden and the cashing of checks? Was there a resolution adopted at that time?

A. (Reading) "It was resolved that Joseph R. and Lila Alden be permitted to sell drafts at the Credit Union office for the convenience of Credit Union members."

Q. There is another paragraph. [53]

A. (Reading) "As a result of increased services to be rendered at the Credit Union office, it was approved that, effective October 11, 1948 the business hours would be: 11:00 a.m. to 1:00 p.m.,——"

Q. Does that show "Monday through Thursday?"

A. Yes, "Monday through Thursday,"——

Q. "11:00 a.m. to 1:00 p.m.—3:30 to 5:00 p.m.?"

A. Yes.

Q. And on Friday 8:00 a.m. to 1:00 p.m. and 3:30 to 5:00 p.m.? A. That is correct.

Q. And then do the words appear, "thus affording service to Swing and Graveyard Shifts as well as the Day Shift?" A. Correct.

Mr. McLaughlin: May we offer this excerpt, your Honor, so we won't have to take the minutes? Mr. Shallenberger has seen it. It is exactly as we have read it.

(Testimony of William A. Hood.)

The Court: Any objection?

Mr. Shallenberger: No objection.

The Court: Received.

The Clerk: Plaintiff's Exhibit No. 5.

(The document referred to was marked Plaintiff's Exhibit 5 and was received in evidence.)

Q. (By Mr. McLaughlin): Now, Mr. Hood, would you turn [54] to the minutes of August 17, 1950, please? A. (Witness complies.)

Q. Would you like me to help you?

A. They should be right here.

Q. Now, I direct your attention to a portion of those minutes which is under Paragraph 3, and I wonder if you would please read that paragraph, Mr. Hood.

A. (Reading) "It was resolved to authorize the present treasurer and assistant treasurer to continue the operation of their check-cashing and money order services, they to assume all liability and expense and retain any profits in connection therewith."

Mr. McLaughlin: Your Honor, I have not had him read the rest. The rest of the minutes are not pertinent to anything here.

Do you mind if I offer the excerpt in evidence, just directing attention to 3? If you wish, you can compare the rest.

Mr. Shallenberger: No. That is all right. I have no objection.

Mr. McLaughlin: Thank you.

(Testimony of William A. Hood.)

The Court: Received.

The Clerk: Plaintiff's Exhibit No. 6.

(The document referred to was marked Plaintiff's Exhibit 6 and was received in evidence.) [55]

Q. (By Mr. McLaughlin): Now, Mr. Hood, do you recall having been present at any discussions about the time of those minutes that you just read concerning this activity of check-cashing, any discussion with Mr. Alden? A. The one of March.

Q. That was in the next year?

A. No, it would be in '53.

Q. Yes. That is what I mean.

A. Yes, sir.

Q. I beg your pardon. Three years later, March '53. Would you turn to that?

I beg your pardon. I think that is the one there is no write-up on.

A. That is correct. There are no minutes of that meeting.

Q. Were you present at a meeting on March 7, 1953? A. That I was.

Q. Incidentally, who was it during the year 1953 that was charged with the duty of writing up the minutes of the directors? A. Mr. Alden.

Q. Joseph Alden? A. Correct.

Q. So far as you have been able to determine the minutes of that meeting were never written up by Mr. Alden, [56] is that correct?

A. That is correct. We have been unable to find them.

(Testimony of William A. Hood.)

Q. Will you tell us who was present, what directors were present at that meeting?

A. Well, there was Mr. Whitacre, Mr. Cook and Mr. Miller—may I use the minutes previous to that, to remember their names?

Q. So far as I am concerned you can, Mr. Hood.

A. Mr. Schultz, the examiner, was there; I recall that.

Q. Who was Mr. Schultz?

A. He was the federal examiner.

Q. Go ahead. What other directors were there?

A. Mr. Peverly and Mr. Alden, Mr. Hadden, Mr. Hood, Mr. Miller.

Q. Was there a quorum present at that meeting?

A. There was.

Q. Now tell us in substance the discussion that took place regarding the check-cashing activity and, as near as you can recall, tell us who said the things you are going to testify to.

Mr. Shallenberger: I will object to the question, your Honor, on the ground it is immaterial, and hearsay.

The Court: Read the question.

(The question was read.)

Mr. McLaughlin: Could I be heard? [57]

The Court: Yes.

Mr. McLaughlin: It is the question of forgery and authority. It goes to the very essence of this lawsuit. If we are entitled to recover on this bond we are suing on, we have to show a forgery within the meaning of that.

(Testimony of William A. Hood.)

Mr. Alden, in some of his testimony, has indicated this was all right. I want to show it was specifically beyond his authority and contrary to his authorization, this check that he cashed. That is the purpose of it.

The Court: Overruled: We will receive the evidence.

Q. (By Mr. McLaughlin): Go ahead, Mr. Hood.

A. That evening we decided we would put an end to this check-cashing service. We were assured that night at the board meeting by Mr. Alden himself that the credit union was connected in no way, shape or form with it, and the money he obtained, he claimed he was a bank messenger and was working——

Q. Did he say he was a bonded messenger for the bank? A. Bonded messenger.

The Court: I think we should have this in the witness' words.

Q. (By Mr. McLaughlin): Tell us in substance the questions and the statements that you people made, and the questions and the statements he made, Mr. Hood.

A. Well, it was that the service that he was rendering was doing more harm to our credit union than what he was doing [58] good, and so the board of directors felt at that time they should stop it.

He had been—had supplies bought ahead of time on some of his envelopes and letterheads, and so on and so forth, for his business that he had in there, and he asked if he could go for a period of time

(Testimony of William A. Hood.)

yet, until he used up those supplies which he had an inventory on.

At that time he was asked again about the funds, and he assured us that he was a bonded messenger from the bank.

Q. I would like to have you say who asked him, and more, in what words, how that came up as to what the funds he was using were, if you can.

A. As I recall, I think it was Mr. Whitacre that asked him, the president at that time of the credit union.

Q. Can you tell us in substance how it was asked or what Mr. Whitacre said to him?

A. All I can say is I know he was asked, I mean in a way that we were trying to put a stop to it. We didn't want it to go on anymore.

And he assured us at that time that he had no—the credit union had no chance of trouble or anything from what he was doing because he was clear, that was his end of it and he was totally responsible for the check-cashing service that he was rendering.

Q. At that time, Mr. Hood, had it ever been brought to [59] your attention that money was being obtained from the Torrance National Bank by checks signed by Mr. Alden, on which he would withdraw money and use it in his check-cashing activities? A. No.

Q. Did you know that was going on?

A. No.

(Testimony of William A. Hood.)

Q. Was there any discussion of that subject, of any such checks, at that meeting? A. No.

Q. Did you know there were unnumbered checks that were being delivered to the bank and on the next day Mr. Alden would pick up that check from the bank by delivering payroll checks which he had cashed on that day or the day before?

A. I did not. The first I heard of that was at the robbery.

Q. Was at what?

A. The first I ever heard of that was the night—the day of the robbery; that was the first time I had heard of it.

Q. As far as you know, the minutes of that March 17, 1953 meeting were never written up by Mr. Alden or anyone else?

A. No, so far as I know they were not written up.

Mr. McLaughlin: I have no further questions.

Cross Examination

Q. (By Mr. Shallenberger): There is no question but what Mr. Alden had been signing checks for the Enesco Federal Credit Union for a good many years prior to April of 1953?

A. That is true.

Mr. McLaughlin: Just a minute. That is too vague, I think. In other words, if counsel means checks generally or if he means these checks for the payroll, I think, should be tied down.

(Testimony of William A. Hood.)

Mr. Shallenberger: You concede he had authority to cash checks?

Mr. McLaughlin: For the benefit of the Enesco Federal Credit Union, for their activities; the signature cards so show.

Mr. Shallenberger: All right. Then you are not raising any question as to the validity of the signature cards, are you?

Mr. McLaughlin: No. I put them in evidence.

Mr. Shallenberger: That is all I have.

Mr. McLaughlin: No further questions, Mr. Hood.

(Witness excused.)

Mr. McLaughlin: Mr. Whitacre. [61]

GALE W. WHITACRE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, sir?

The Witness: Gale W. Whitacre.

Direct Examination

Q. (By Mr. McLaughlin): What is your present occupation?

A. I am license and tax inspector and police officer.

Q. In 1953 and prior thereto by whom were you employed?

A. Early part of 1953, National Supply Company.

(Testimony of Gale W. Whitacre.)

Q. Were you at any time connected with the Enesco Federal Credit Union as an officer or director? A. Yes.

Q. Tell us what period of time you were a director of that company.

A. I was elected to the board of directors in January of 1953; elected president in February of 1953.

Q. Were you present at the meeting of the board of directors that Mr. Hood just mentioned in March, 1953? A. Yes, sir.

Q. Will you tell us, according to your recollection, who was present?

A. Leonard Hadden, Mr. Peverly, Mr. Aubrey Cook, Mr. [62] Hood, myself, and Federal Auditor Mr. Robert Schultz. Seven members all together.

Q. Prior to that meeting, had you been present at any discussions with Mr. Alden concerning this check-cashing activity that he was carrying on on the premises of the Enesco Federal Credit Union?

A. Yes.

Q. Were you present at any discussion when Alden was present?

A. The first discussion I had with Mr. Alden pertaining to his activities, other than the credit union, was after I was elected president in February and before the March board meeting.

Q. All right. Now, will you state where that took place and who was present?

A. In the credit union office.

Q. Where? A. In the credit union office.

(Testimony of Gale W. Whitacre.)

Q. Who was present?

A. Mr. Alden and two other employees in the credit union.

Q. Now tell us what was said about this check-cashing activity.

Mr. Shallenberger: I would like to object on the ground it is immaterial and hearsay. [63]

Mr. McLaughlin: It is the same thing again; it is authority, your Honor.

The Court: Overruled.

The Witness: I wouldn't say it was anything particularly that was said about the check-cashing service, exclusively, but of his activities on the whole, which I objected to as president of the credit union.

Q. (By Mr. McLaughlin): Well, you haven't told us anything.

A. Well, his activities were check-cashing services, writing money orders, buying license plates, paying bills for people, and etcetera. As such, it was taking up so much of his time and the employees' time that the credit union business was suffering.

Therefore, I objected to his activities, and I told him I was going to take it up with the board of directors.

Q. Did you know he was at that time using Enesco Federal Credit Union checks to get money from the Torrance National Bank to use in those activities?

A. No, sir.

Q. You did not. When did you next have a dis-

(Testimony of Gale W. Whitacre.)

cussion with Mr. Alden? Did you have another one before that meeting?

A. Not to my recollection.

Q. All right. Now, tell us what was said by the directors, and, if you can, tell us who said it and also what was [64] said by Mr. Alden concerning that activity.

Mr. Shallenberger: At that meeting?

Mr. McLaughlin: Yes.

Mr. Shallenberger: May I have the same objection on the grounds of hearsay and it being immaterial?

The Court: Overruled.

The Witness: I believe most of the discussion was carried on by myself in explaining to the board and the federal auditor and discussing with Mr. Alden why I objected to these services which he was rendering, on the grounds that the credit union business was being neglected because they just couldn't take care of everything.

I objected to it because the federal bylaws provide that a credit union cannot perform these services and make a charge. They can perform these services, but they cannot make charges for them. And as such, the credit union was becoming involved or construed as a credit union making these charges and not the Alden enterprises, so to speak.

Also, because the federal examiner objected very strenuously to these enterprises the Aldens were carrying on extra.

(Testimony of Gale W. Whitacre.)

Q. (By Mr. McLaughlin): Incidentally, was Schultz, the examiner, there?

A. Bob Schultz, the federal examiner, was there.

Q. Now, you have told us what you said. Will you tell us what Mr. Alden said on that occasion?

A. Mr. Alden was very upset. He practically begged us to let him continue his money order service, until his current supply which he had purchased—in other words, he had quite a bit of money involved in money orders—until his current supply of money orders was up; he asked us to let him continue. He assured the board of directors that the credit union funds in no way, shape or form were involved in this check-cashing or other enterprises. He also assured us he was a bonded messenger from the Torrance National Bank and that he was currently negotiating, even then, for an armored car to make these money deliveries to the credit union office.

Q. Did you know at that time that he had been using Enesco Federal Credit Union checks to get the money——

A. No, I did not.

Q. Did you know he had a supply of unnumbered checks which he had printed up and was using for that purpose?

A. Not at that time, sir.

Q. When did you learn that?

A. Approximately sometime around April the 4th or 5th.

Q. Of 1953? A. Of 1953; after the robbery.

Q. That was after the robbery?

(Testimony of Gale W. Whitacre.)

A. After the robbery.

Mr. McLaughlin: I have no further questions.

Cross Examination

Q. (By Mr. Shallenberger): I gather, Mr. Whitacre, that the board did say he could continue with his check-cashing activities, until his supplies were used up, at any rate?

A. We told—the board agreed he could continue his money order activities, until his money orders were used up.

Q. In any event, he continued the check-cashing activity after that board meeting?

A. Yes, I believe there would be a payday in there before the robbery.

Q. You knew that he was continuing to do that, didn't you?

A. We knew he was continuing to cash checks, yes.

Mr. Shallenberger: That is all.

Mr. McLaughlin: I have no further questions.

The Witness: May I be excused?

The Court: Yes.

(Witness excused.)

Mr. McLaughlin: Miss Sandstrom.

ANNA SANDSTROM

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please take the stand.

Will you state your name, please? [67]

The Witness: Anna Sandstrom.

Direct Examination

Q. (By Mr. McLaughlin): Where do you reside, Mrs. Sandstrom? A. I live in Torrance.

Q. What is your occupation? A. Teller.

Q. You are now employed by the California Bank? A. That is right.

Q. In Torrance? A. Yes.

Q. That is the bank that was formerly the Torrance National Bank, before it sold its good assets to the California Bank? A. That is right.

Q. You were employed in what capacity by the Torrance National Bank in April of 1953, and prior thereto? A. Teller.

Q. Did you know Joseph Alden?

A. Yes, sir.

Q. Now, you were the teller who would accept the check which he would bring in on Thursday afternoon and count out the currency which would be delivered to him after 3:00 o'clock, isn't that right? A. That is right. [68]

Q. You did perform that function on Thursday, April 2, 1953? A. Yes.

Q. That was the day he was robbed later on.

(Testimony of Anna Sandstrom.)

Incidentally, Mr. Post was the president of that bank at that time, wasn't he? A. Yes, sir.

Q. And he is now deceased?

A. That is right.

Q. Mr. Dinwinger was the cashier and vice president? A. That is right.

Q. And what is his condition?

A. What is his what?

Q. Is he alive or——

A. He is paralyzed; he has had a stroke.

Q. He has had a stroke? A. Yes.

Q. During the period you were handling these checks that Mr. Alden would bring, these checks of the Enesco Federal Credit Union, did you know that Mr. Alden was using that money in any personal venture, as distinguished from the business of the Enesco Federal Credit Union?

Mr. Shallenberger: I will object——

The Witness: No.

Mr. Shallenberger: ——to that question as being immaterial, [69] what this lady did or didn't know.

The Court: Sustained.

Mr. McLaughlin: She was one of the functionaries or representatives. If she knew it was, it would certainly obligate the bank. There is a presumption of good faith, we could indulge here, she did know it. In other words, she is presumed to act in good faith and not to violate the law.

But I was just asking her, unless this presumption is going to operate——

Mr. Shallenberger: I don't see how it could be

(Testimony of Anna Sandstrom.)

material, what Mrs. Sandstrom knew or didn't know.

Mr. McLaughlin: Suppose she knew that he was using it in his personal activities. Her knowledge would bind the bank.

The Court: All right. She may answer.

Mr. McLaughlin: Will you read the question?

(The question was read.)

The Witness: I did not.

Q. (By Mr. McLaughlin): You accepted the checks of the Enesco Federal Credit Union when you paid out the money? A. That is right.

Q. Did you know whether or not check-cashing activities were carried on over at the Enesco Federal Credit Union office?

Mr. Shallenberger: I will renew my objection, it is immaterial.

Mr. McLaughlin: The same—— [70]

The Court: Overruled.

You may answer that.

The Witness: Well, I presumed he was using it for cashing checks. I don't know what he had it for.

Q. (By Mr. McLaughlin): I mean, did you know whose business that was? A. No, I didn't.

Q. Did Mr. Alden ever state to you or in your presence anything about that being his own personal business, as distinguished from the Enesco Federal Credit Union's business? A. No, sir.

Q. Was Mr. Alden ever made a bonded messenger by the Torrance National Bank?

(Testimony of Anna Sandstrom.)

A. No, sir.

Q. Was he ever employed by the Torrance National Bank in any capacity? A. No, sir.

Mr. McLaughlin: I have no further questions.

Mr. Shallenberger: I have forgotten, your Honor, —Mr. McLaughlin, you could help me out here, too, —did we establish as part of this arrangement that checks were postdated?

Mr. McLaughlin: They were dated on the date—I don't know they all were. I think this one was, it was dated on the 3rd and brought in on the 2nd.

The Court: I don't think there has been any evidence on that, but you have mentioned it in your memoranda, which of course are not evidence. Maybe you can cover it by stipulation, if the witnesses have gone that could establish it.

Mr. Shallenberger: I will offer the stipulation as part of this practice to which Mr. Alden testified, that the custom was for the check, which was brought in on Thursday, drawn on the Enesco Federal Credit Union account, to be dated as of the following day, which was Friday.

Mr. McLaughlin: Well, could we ask Mrs. Sandstrom? She probably knows.

I know it was true as to this particular one, but I don't know whether it was always true.

Was that true, Mrs. Sandstrom?

The Witness: I wouldn't know.

Mr. McLaughlin: Anyway, this one was.

Mr. Shallenberger: I would like to establish it.

(Testimony of Anna Sandstrom.)

Cross Examination

Q. (By Mr. Shallenberger): As a general practice, is it true, generally speaking, Mrs. Sandstrom?

A. I never noticed the date, what date he had on it, if it was postdated or not.

Mr. Shallenberger: Well, I thought that maybe I could find something here in her deposition on a previous occasion. I don't notice it offhand. [72]

I don't know that it is going to be material to my case, but, in any event, if we deem it is, I may have to ask to recall Mr. Alden in connection with the matter. But for now I will drop it, in view of her answer.

The Court: Anything further from this witness?

Mr. McLaughlin: I have no further questions.

The Court: Thank you.

(Witness excused.)

Mr. McLaughlin: Plaintiff rests.

Mr. Shallenberger: I have nothing further at all, your Honor, with the possible exception of Mr. Alden coming back to testify that these checks were, as part of the custom and procedure, dated on Friday, although they were taken to the bank and paid on Thursday.

Mr. McLaughlin: I don't think it makes the least bit of difference.

Mr. Shallenberger: Well, if you don't think it makes any difference——

The Court: He has the legal theory in which it might be of importance,——

Mr. McLaughlin: Yes.

The Court: —although I think this particular check is the one that would control on that, if your theory is applicable, rather than what they did on the checks months earlier.

Mr. Shallenberger: Let me ask this, to pin it down a bit: [73]

If Mr. McLaughlin doesn't think it makes any difference, why don't you stipulate with me that was part of the custom?

Mr. McLaughlin: I would if I were sure it was. I know this—I will go this far—I know when he would bring these checks in he would bring them in after—the transaction was after 3:00, so that, in other words, it would correlate with the next day.

Mr. Shallenberger: He testified——

Mr. McLaughlin: So it probably was.

Mr. Shallenberger: He testified he would bring them in during the business day and then pick up the money after hours.

Mr. McLaughlin: Whatever it was. The money transaction would take place after 3:00. I would stipulate Mr. Alden would so testify,——

Mr. Shallenberger: All right.

Mr. McLaughlin: —provided I can have in that stipulation his explanation which he made, which was that the transaction took place after 3:00 o'clock. In other words, he got his money after 3:00, which was the beginning of the next day.

The Court: I will take a short recess and you get together on your stipulation.

(Whereupon, a recess was taken from 3:25 o'clock p.m. to 3:40 o'clock p.m.)

The Court: Did you get together on a stipulation? [74]

Mr. Shallenberger: I think we have one, which is that it was a part of the custom and procedure, that Mr. Alden would testify that it was a part of the custom and procedure, as he outlined, for him to date the checks as of Friday, although they were taken in on Thursday, and he would pick up the money after the close of business on Thursday.

Mr. McLaughlin: Yes, I will stipulate to it. I don't think it makes any difference, but I will stipulate to it.

Mr. Shallenberger: Thank you. Then I rest.

The Court: The stipulation is approved.

You have argued your positions pretty well in the memoranda. How do you want to carry on from here? Do you want to have oral argument or submit the matter on written briefs?

Mr. McLaughlin: I have pretty well exhausted my privileges. I answered his, I hope, today.

Did your Honor read that one I sent up today?

The Court: I read it, but I can't say I thoroughly digested it.

Mr. McLaughlin: Well, whatever Mr. Shallenberger prefers. I wouldn't mind making a brief discussion of it, if your Honor wants.

The Court: The court wants to give you a full trial, so you go ahead and argue, if you want to argue.

Mr. McLaughlin: All right, your Honor.

The Court: I don't mean by that I have made up my mind [75] against you.

Mr. McLaughlin: I understand.

The Court: I haven't made it up either way. It seems to the court, though, that we are concerned primarily with the definition of "forgery".

Mr. McLaughlin: Yes.

The Court: That that is going to be the controlling question in the case.

Mr. McLaughlin: Yes, your Honor, I think that it true. I will say this: This is really nothing more than an action on a contract. The indemnity bond is the contract.

We have cited the cases which say that if there is any doubt in the construction of the document, that it is construed against the insurer. But an examination of the language of that bond, your Honor,—that is one thing Mr. Shallenberger hasn't dealt with in his brief, to any extent,—shows, I believe, that the bond is even broader than our Section 470 of the Penal Code.

I don't know that Section 470—I think it is governing, I think it has some governing effect, and I think we can rely on it. But, in view of the fact that the bond was broader, I don't think we have to worry much about Section 470.

That bond covers any insurance where a document is forged, in reliance upon which money is paid out. It doesn't make any difference whether it

is a check, a note or any other kind of [76] an order.

The Court: It couldn't be such a remote thing as an application for credit?

Mr. McLaughlin: It seems so. It seems the broadest kind of language.

Of course, your Honor will also note in this case, however, that the general bond which these people issued didn't cover this kind of a liability. This was a special liability which the plaintiff bought, so it was put on this policy as a rider.

Furthermore, your Honor will note the normal amount of the bond is a fixed sum, \$75,000.00 or \$100,000.00, something like that.

In giving this type of insurance, which is very broad, they limit their liability to \$10,000.00, so, in any event, their liability is cut down to that.

I only mention those things to indicate this is not only a contract, but it is a special contract. The bank said, "We want this kind of protection," and so the insurance company said, "We will give it to you in a rider form," and that is what they got and they paid for.

Now, we are met with the contention here of one thing—I mean, Mr. Shallenberger said it was a loan, it was an overdraft. I don't care what it was. In other words, we paid the money out in reliance upon a check of the Enesco Federal Credit Union. There isn't any question in this case but what Mr. Alden used that check as the method of obtaining this money. It was delivered to the bank before the

money was paid out, so it was the document on which the transaction turned.

Yet there isn't any question that Mr. Alden had no authority to use that money in his own personal business. He quibbled about that up there on the stand.

I want to say this, your Honor, and I didn't deal with this in my points and authorities, but I have cases on it if it becomes pertinent: Even if some officer of the Enesco Federal Credit Union had known he was using this money for this purpose they couldn't have authorized it, anyway.

Your Honor has heard the law. Even these people know it was the law, and, furthermore, that is true under the credit law. In other words, they couldn't consent to it if they wanted to. They couldn't have made it a good act, as distinguished from a forgery. The same is true as to the bank.

The Court: I was thinking rather automatically and not too clearly at the time of estoppel. Estoppel wouldn't come into play here because the credit union is not a party to the action.

Mr. McLaughlin: That is true. I will say this: Your Honor has undoubtedly read that case, the Torrance National [78] Bank case which we cite in our briefs. We almost won that case on the basis of estoppel. We did win it in the trial court on the grounds of which party was the most negligent.

We aren't concerned with those things. Maybe we were negligent, maybe we were at fault, maybe if we had been more careful we would have called

up some officer of the Enesco Federal Credit Union and said, "Say, this man is getting \$30,000.00 and he is handing in unnumbered checks. What about it?"

In other words, I can conceive of instances where, if it were a case between the Torrance Bank and Enesco, where the trial judge held one way, he said that Enesco was negligent. The appellate court said they weren't, and they held the Torrance Bank was a party.

That doesn't have anything to do with the fact the bank paid the money out on the forgery. That is why they buy these bonds. You can't insure that everybody in your bank or your institution is going to be at all times completely wise and not make any errors, so you buy that just like a man buying an automobile, he buys public liability insurance. He knows he is a safe driver perhaps, and he knows he is going down the street and not have any trouble, but he still says, "If I am negligent sometime or held to be I want protection." That is what the bank did in this instance. They were buying protection, which they paid for. [79]

So it does resolve itself down, as your Honor stated, to a question of whether or not there was a forgery. And when you get down to that, as I stated, he had no authority to sign that and he couldn't have been given authority to use that money personally, and even if you disbelieved the testimony of Mr. Whitacre and Mr. Hood, and you gave Mr. Alden's testimony, vague as it was as to

these authorizations, the greatest possible weight and extent, you still would have a situation where they couldn't authorize him to misappropriate money. That is what it amounted to.

The Court: He had authority to draw checks for the purposes of the association.

Mr. McLaughlin: That is true.

The Court: When did the wrongful part of it come into play?

Mr. McLaughlin: When he drew it for a purpose of his own, and that is true of—your Honor will find in one case I can pick out of the air, the 7 California Appeal (2d) case, which Mr. Shallenberger cited and which I cite, too, in my reply brief, that that is an instance where an officer had misappropriated money.

In other words, most of these forgeries, or a great number of them—there are others cited in my brief—are instances where the officer has authority to do this and they are always the ones that take advantage. What do they do? [80] They forge the signature and use it for themselves. It becomes a forgery when they write it without authority; written without authority for that particular act. In other words, when you are using the money yourself and you are drawing the check for your personal use, it is then without authority. The fact that you have general authority to sign a check on the account of your corporate principal does not mean that you can sign checks on your corporate principal and put the money in your pocket, knowing you are going to do that.

Mr. Alden knew that. This is conceded, the only purpose he would get that money for was to cash his own checks in his own business.

So, your Honor, it is like all of these cases. As I state, most of the forgeries involve signing somebody else's name. Incidentally, under the Penal Code section that is one of the things it says, signing a name without authority.

Assume I give Mr. Shallenberger authority to sign checks for a certain purpose or sign a certain check. He has authority to do that. That is for a specific purpose. That doesn't mean, just because he has got authority to sign checks, he has got authority to misappropriate. Forgery includes that type of embezzlement.

I say again, your Honor, all we have to do—and I am not going to even take the time to look or to quote, because [81] it is quoted in my brief, both Section 470 of the Penal Code and also the language of this bond. That is the point.

As I say, I think the answer is very clear, that this was a forgery. It was the type of thing he could have—in other words, it was a criminal act. So far as that is concerned, it was an act creating liability so far as this concern is concerned.

I don't believe there is much else I have to talk about in this case. Mr. Shallenberger's brief indicates—and I will say this with all due credit to him—the weakness of his case. All he has come up with is cases.

I am not taking any credit, your Honor, but I notice the cases he cited are cases apparently some-

body in his office got out of our brief in that other Torrance Bank case.

They don't deal with forgery. They deal with who is liable as between two parties, as, for instance, the Boston Insurance case. That was the case we persuaded the trial court to rule with us on, and we thought we could win in the appellate court.

The appellate court said that the Boston Insurance Company case wasn't in point. They don't even mention forgery. They are not involving an action on the forgery of bonds. They are not involving a criminal action of forgery, but only who is liable as between the two parties, the bank or the insurance company. We had them all in our other brief. [82]

At that time, in that Torrance case, we were not concerned with the question. I believe everybody assumed there had been a forgery; there wasn't any question about it.

The question in that case was, was your bank more negligent than the Enesco?

The court, as your Honor will recall, did put a great deal of weight on—after all, what he was doing was borrowing money on these checks. Of course, the court didn't notice there was actually ten thousand some-odd dollars in that account at the time the check was delivered to the bank. They put stress on the fact that, after all, it was an overdraft. He couldn't have had any ostensible authority, anyway.

Your Honor can see how this developed. There is enough evidence here to show that originally this act was something Mr. Alden was permitted to do.

It was a deal they started out as small, and so forth.

He was told later on they had to stop it, and, of course, there is no question about the meeting of March 17, 1953, when he was very clearly told; and where he made the representations to them, "I am not using your money at all. I deal with the bank," and so forth.

Your Honor, I think that is a logical explanation to this whole situation, too. Why would Mr. Whitacre or Mr. Hood or anybody else connected with the Enesco Federal Credit Union permit a man to use \$30,000.00 of their money, unless they had [83] authority to do it? They wouldn't have.

I know Mr. Alden was in a spot. I have a great deal of sympathy for him. I will say that I think it is very clear, by measuring his own testimony, he had no authority and couldn't have gotten authority to do what he did. I submit the case is just that simple, so far as the bond is concerned.

We come within the terms of the bond. We paid money out on a forged document. I mean, we are entitled to a decree.

With that, your Honor, I think I will conclude.

The Court: Do you want to write some briefs or do you want to argue?

Mr. Shallenberger: I don't think there is any necessity for further writing briefs, if I may reply very briefly to what he has said.

The Court: Certainly.

Mr. Shallenberger: Actually, I think that the points have been thoroughly covered in the documents that we have submitted. I only wanted to

add this: That it seems to me that the weakness of Mr. McLaughlin's position is demonstrated by his reply to my memorandum of points and authorities, because throughout, in presenting his case he begs the question. He never gets down to tacks and says, "The law isn't the way Mr. Shallenberger says." He doesn't do that at all. But, instead, he dodges it, and I think that is apparent from reading it. [84]

One question which he raises is the meaning of our bond here. I don't see there is any ambiguity in the bond, and I don't believe that the matter is even being seriously presented. It seems to me that counsel has got to come down to the conclusion, which actually was stated as the issue by your Honor, was this a forged document, because, before the plaintiffs in this case can have any action of any sort, regardless of whether it is treated as a loan or any other type of a transaction, it has got to be a loss resulting from a forged instrument.

So the question is, is this a forgery? That is the way the issue has got to boil down.

Now then, one thing which counsel has done in his brief in this case, he has made the statement that the State action, which is in 134 Cal. App. (2d) and involved the same party plaintiff here, Torrance National Bank in its suit against Enesco, he said the holding in that case was that the check was a forgery.

That is not the holding of the case and there is no such holding in that case. As a matter of fact, I have quoted in my brief a small portion of that

holding, and I think it is the specific holding of the case.

If I may, I would just like to read it, your Honor, at this time. Reading from page 328 of that opinion:

“The transaction now being considered involved [85] only one check.”

They are in that case considering exactly the same transaction we have been talking about here today. Continuing now with the opinion:

“It was unauthorized.”

That is the further reason that the court gives, they say the check was unauthorized. That was the conclusion they came to. And they go on in this very significant language:

“The fact that any check for an amount less than or up to the amount of deposit would have been authorized does not alter the fact that the check involved in the instant case was unauthorized.”

In other words, what the case is holding is that if these checks that we are involved with here had been for, say, \$9,000.00, then they would have been perfectly proper and the Enesco Federal Credit Union ultimately would have been the one who would have had to suffer the loss in the case.

So the mere fact that he wrote a check for an amount in excess of that which was on deposit has only one effect, namely, a lack of authorization to write that large a check and, certainly, it does not constitute any forgery.

In that connection I have cited some cases to your Honor where the courts recognize the fact that there are two [86] possible means for a bank in a

situation like this to suffer a loss. One would be because of a forgery, and one might be because of a lack of authorization on the part of the person who is drawing the check for another. And they recognize that.

You will see in the cases where they say, "Well, this may be either unauthorized or it may be a forgery." They put the "or" in there all the time. One case even goes so far as to say—I cited it to your Honor—"It is true we must indulge in a presumption that what this man was doing was correct, and therefore we can't indulge in the presumption it was a forgery, but we can indulge in the presumption it was unauthorized." And that case specifically recognizes that very distinction.

There was that first point made here, and nothing in the Penal Code section cited or nothing in our bond can change that fact.

In connection with the Penal Code, I would like to point out to your Honor that what they are talking about there, as is apparent from the cases, is a lack of authorization to sign checks; a lack of authorization to sign. In other words, if you don't have the right to sign the signature of another, that is forgery. That is what the Penal Code says.

The Court: And you are saying that here he had the authority to sign and that what he did was to misapply the funds? [87]

Mr. Shallenberger: That is all. I say that doesn't make a forgery. That is the sum and substance of it.

In that connection I might point out one other case which gives a definition of "forgery".

The Court: The case is not cited?

Mr. Shallenberger: It is not cited in mine. I am not sure whether plaintiff cited it in his or not.

The Court: Let's have it then.

Mr. Shallenberger: It is *People v. Ryan*, 74 Cal. App. 125, at page 128. This portion I am referring your Honor to, I think, is incidental language or dicta, you might say, but I think it is helpful to us, in any event. The case says:

"Special reliance is placed by appellant upon decisions which hold that 'It is the essence of forgery that one signs the name of another to pass it off as a genuine signature of that other.' "

Then the court goes on and says, "Well, we aren't applying that rule here" because we have the fact that he signed a fictitious name in the *People v. Ryan* case. But they recognize the validity of the rule. In other words, we don't have any question of fictitious name, so we aren't concerned with that phase of it.

People v. Ryan goes on to make the distinction. And my point is, in citing it to your Honor, they are telling us what the essence of the forgery is. I submit there is nothing of that sort here at all.

The other point I think is covered sufficiently, namely, that in any event the bank wasn't relying on the check which was being presented. That therefore it was not an instrument which was being uttered, passed or made with the intent to defraud. That point, I think, is covered adequately in my memorandum, and I think it is the secondary reason why there couldn't be a forgery in this case.

Thank you.

Mr. McLaughlin: Your Honor, I don't care to reply, except that this Walsh case is an example. Counsel cited it first. That is on page 6 of my reply brief.

That is about an officer of a corporation who had authority to sign checks, but he was held to have forged when he signed checks for his own purposes.

If the argument Mr. Shallenberger makes on forgery were true, then there never would be an instance where an officer of the corporation or any bank could ever be held in forgery, so long as he was authorized to sign checks generally. In other words, he would never be liable for forgery, because authority to sign would be deemed as authority to sign, regardless of what purpose. That is not the law, your Honor.

That is all I have to say.

The Court: The court has read your briefs. You call them memoranda, but they are really briefs.

I have had a very busy court here during the past few weeks and I have not gone back of them and read the cases. I would like to do that before coming to a decision, so the matter will stand submitted.

(Whereupon, at 4:03 p.m., Wednesday, November 28, 1956, an adjournment was taken.)

[Endorsed]: Filed July 1, 1957.

[Endorsed]: No. 15627. United States Court of Appeals for the Ninth Circuit. Torrance National Bank, a national banking association, Appellant, vs. The Aetna Casualty & Surety Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 17, 1957.

Docketed: July 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15627

TORRANCE NATIONAL BANK, a national
banking association, Appellant,

vs.

THE AETNA CASUALTY & SURETY COM-
PANY, a corporation, Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL

To Paul P. O'Brien, Clerk of the U. S. Court of
Appeals:

Comes now the above-named appellant and, in

connection with the above-entitled appeal, hereby sets forth the points on which it intends to rely on appeal:

1. The signing by Joseph Alden of the \$30,000.00 check as Treasurer of Enesco Federal Credit Union was a signing without authority, and, therefore, when Joseph Alden cashed it at appellant bank, this constituted a forgery within the meaning of appellee's bond and the law of the State of California which rendered appellee liable.

2. Where an agent authorized to sign on his principal's bank account does so for the purpose of obtaining moneys for his personal use, this constitutes a forgery.

3. The District Court erred in relying upon a decision which involved forgery committed before the amendment to Section 470 of the Penal Code, which amendment made the signing without authority a forgery.

4. The District Court erred in failing to apply the rule that if there was any uncertainty in the meaning of the bond, such uncertainty should have been resolved against the appellee who drafted the bond.

5. Even though a representative of appellant bank had known that Joseph Alden was using the moneys for his personal check-cashing business, this would not defeat appellant's right to recover on the forgery bond.

The entire record as certified to you must be

printed in its entirety, as the above points upon which appellant intends to rely on appeal are framed by the pleadings, exhibits, oral proceedings at the time of the trial, as reflected by the reporter's transcript thereof, and by the findings and judgment.

Dated the 15th day of July, 1957.

/s/ JAMES A. McLAUGHLIN,
Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 17, 1957. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PAPERS AND RECORDS ON APPEAL

To Paul P. O'Brien, Clerk of the U. S. Court of
Appeals:

Please Take Notice that plaintiff on its appeal hereby designates, as being material to the consideration of the appeal and for inclusion in the printed record on appeal, the following pleadings, papers, records and exhibits, to wit:

1. The Amended Complaint for Declaratory Relief;
2. The Amendment to Amended Complaint for Declaratory Relief;

3. The defendant's Answer to the Amended Complaint;
4. The trial court's Memorandum of Decision dated March 28, 1957;
5. Findings of Fact and Conclusions of Law;
6. Judgment;
7. All exhibits admitted in evidence;
8. Plaintiff's Notice of Appeal and Designation of Papers and Records on Appeal;
9. The Reporter's Transcript of the trial proceedings; and
10. All minute orders of the trial court.

Dated this 15th day of July, 1957.

/s/ JAMES A. McLAUGHLIN,
Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 17, 1957. Paul P. O'Brien.
Clerk.

No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

CRIDER, TILSON & RUPPÉ and
GARVIN F. SHALLENBERGER,

548 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellee.

FILED

SEP 30 1957

PAID BY THE COURT

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No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Although this matter was originally filed by the Appellant in the Superior Court of the State of California, in and for the County of Los Angeles, it was transferred to the District Court of the United States on the ground of diversity of citizenship, with over \$3,000 involved. Appellant is a citizen of California and Appellee is a citizen of Connecticut.

The case was tried on the issues presented by the Amended Complaint, to which an Amendment had been filed, and to which Answer was made by Appellee.

Judgment having been duly rendered and entered in favor of Appellee, the Appellant has taken this Appeal,

after first having moved the Court to reopen and re-argue the law applicable to the case. Appellant's Motion was denied.

Statement of the Case.

Although the Appellant's Statement of the Case is generally satisfactory to Appellee, there are certain additional matters to which Appellee will herein refer. In so doing, undoubtedly some of the ground already covered in Appellant's Statement of the Case will be gone over again. However, this Statement by Appellee will cover only the important points, none of the lesser details.

Joseph R. Alden was at all times material to this lawsuit, the Secretary-Treasurer, as well as the General Manager, of an organization known as Enesco Federal Credit Union. As such, he was duly authorized to sign checks for and on behalf of the Enesco Federal Credit Union. [R. 5.]

The Enesco Federal Credit Union maintained a checking account with the Appellant. Alden also maintained a personal bank account with the Appellant Bank under the name of "*Enesco Service Fund.*" [R. 6.] He had established this other account to assist him in the operation of his personal business, which consisted of cashing checks for the employees of National Supply Company and writing utility money orders for them. [R. 6 and 8.]

Over a period of several years, long prior to the transaction over which this litigation developed, Alden had built up a procedure by which he would present to the Appel-

lant bank an Enesco Federal Credit Union check, signed by him as Treasurer. The check would be dated as of Friday. It would be given to the bank on Thursday, during business hours. He would pick up the money which represented the amount for which the check was written after the close of business on Thursday. [R. 9 and 75.] He would use this money to cash National Supply Company payroll checks on Friday. He would deposit these checks to his personal Enesco Service Fund Account. After making this deposit, a debit in the amount of \$30,000 (or whatever the amount of the check was) would be made on the Enesco Service Fund Account, in favor of the Appellant bank. [R. 9, 17 and 42.]

Years earlier, he had arrived at the point where the amount that he wished to withdraw from the Enesco Federal Credit Union Account exceeded the amount that was generally on deposit in that account. [R. 12 and 17.] Both the President and the Executive Vice-President of the Appellant bank were informed, in advance, of this system which Alden employed, and, as a matter of fact, a charge was made by the bank for each of these weekly transactions. [R. 18 and 19.] The amount charged went up as the amount which Alden withdrew increased. [R. 19 and 20.] The amount of this charge was actually paid from funds in the *Enesco Service Fund* account. [R. 20.] Alden told these same bank officials that the funds were being used for his own check-cashing business, and that this business was not connected with the Enesco Federal Credit Union. [R. 21.] Each time that he in-

creased the amount that he wanted to withdraw for his check-cashing operations, he would, of necessity, discuss the matter with one or both of these officials and secure their approval of the increase. [R. 22 and 23.]

As a part of this procedure or system, after sufficient money had been deposited in the Enesco Service Fund account to cover the amount of the check that had been presented the day before, the bank would return that check to Alden. [R. 24 and 25.] In this manner, of course, the checks would never reflect on the bank's records, nor would they reflect in any of the bank's statements on the Enesco Federal Credit Union account. The Enesco Federal Credit Union checks which Alden used in connection with this practice were unnumbered. [R. 25.] Generally, these checks would be redeemed on Friday, but sometimes they would be redeemed on Saturday, back in the days when the bank was open on Saturdays. [R. 42.]

The particular check which forms the subject of this lawsuit was dated April 3, and had been taken to the bank by Mr. Alden on Thursday, April 2. He withdrew \$30,000 upon leaving the check with the bank. He was thereafter robbed of the money. [R. 11.] This particular check was, of course, "cashed" pursuant to the procedure that is above described. It will be noted from an examination of the check itself, which is in evidence, that the bank stamp indicates that the check was paid on April 4, 1953, indicating, of course, that the check was not processed through the usual bank operations until two days after it had first been presented to the bank.

Some time thereafter litigation developed between the bank and the Enesco Federal Credit Union, and the bank having lost, it has not recovered the \$30,000. (See *Torrance National Bank v. Enesco Federal Credit Union*, 134 Cal. App. 2d 360.)

The bank has sued its bonding company in this litigation contending that this particular check dated April 3, 1953, was in fact a forgery. There is no question but that Alden had the authority to sign checks for and on behalf of Enesco Federal Credit Union. [See Pltf. Ex. 1, which was introduced into evidence by Plaintiff itself.] It is the position of Appellant, and it is actually the only issue involved in this appeal, that this check was a forgery because Alden intended to apply the funds gained from "cashing" the check to purposes which were beyond his authority as an official of the Enesco Federal Credit Union.

Another issue is, regardless of whether the check itself would otherwise be a forgery, did Alden have the necessary intent to defraud? The trial court, as may be seen from reading its Memorandum Opinion, based its decision on the former issue and held that there was no forgery, since Alden had the authority to sign checks for and on behalf of Enesco Federal Credit Union.

ARGUMENT.

A. Summary of Appellee's Position.

The bond in question permits the bank to recover from the bonding company any loss occasioned by cashing or paying forged checks or through the establishment of credit based upon forged checks. Appellant argues, on pages 24 and 25 of its Brief, that any uncertainty in the meaning of the bond should be resolved against the bonding company. Since Appellant cites no portion of the bond's language, which it contends to be ambiguous or uncertain, Appellee submits that it cannot possibly argue this point. There is no contention of Appellant which Appellee can meet. Therefore, all that Appellee will do in this Brief is to state that the portion of Appellant's Brief devoted to this issue is purposeless, and therefore Appellee will make no effort to refute it.

To consider the basic issue, it is Appellee's position that the check dated April 3, 1953 is not a forgery, because it was signed by Alden as Secretary-Treasurer of the Enesco Federal Credit Union, which office Alden in fact held at the time; and further, as such official, he was specifically authorized to sign checks for that organization. Put another way, there can be no forgery *in this state* where a check is signed by one with authority to sign it, even though he does misapply the funds gained through securing payment of the check.

Secondly, Appellee contends that, in any event, there was no intent to defraud, which is a necessary element of any forgery, and is specifically included in the definition of forgery as contained in Section 470 of the California Penal Code.

B. There Was No Forgery Because Alden Was Authorized to Sign Checks for His Principal.

Counsel for Appellant makes much of the change that was made in Penal Code Section 470. It is his contention that the case of *People v. Bendit*, 111 Cal. 274, is no longer the law because of this change. In saying this, he entirely ignores the fact that *People v. Bendit* was quoted with approval in the very recent case of *Pasadena Investment Co. v. Peerless Casualty Co.*, 132 Cal. App. 2d 328. Equally damaging to the Appellant's contention is the fact that the language added to this code section specifically states that signing *another's name without having authority to sign that other's name* is a forgery. In other words, the phraseology which was added to the code section clarifies that code section so that it is impossible for it to take on any other meaning than that which is contended by Appellee. In the following partial quotation from Penal Code Section 470 the significant portion which was added is italicized so that its applicability to the issue under discussion may be clear.

“Every person who, with intent to defraud, *signs the name of another person, . . . knowing that he has no authority so to do*, to, or falsely makes, alters, forges, or counterfeits, any . . . check, . . . or request for the payment of money, . . . is guilty of a forgery.”

It will be noted by reference to the Appendix in Appellant's Opening Brief that, even prior to 1905, it was a forgery to falsely make, alter, forge, or counterfeit a check. The important addition to the code section, for our purpose, was the plain and simple provision that the signing of the name of *another* person, without authority to sign his name, was also specifically included in the

code definition of forgery. Actually, it is just as likely, if not far more likely, that the purpose of the addition to the code section was to clarify it so that it specifically set forth the rule which was propounded in the case of *People v. Bendit, supra*. The wording of the added language certainly suggests that this was the intent, rather than, as Appellant argues, to make the signing of one's own name a forgery. Why else would the framers of this addition to the code section use the word "another," when they said that the signing of the "name of another person" without authority, is a forgery?

Having concluded the argument and reasons why the change in Penal Code Section 470 made no change in the rule stated in *People v. Bendit, supra*, it is undoubtedly proper at this point to set forth what that case holds. Perhaps the best way to do that is to quote from the very recent case, previously cited, of *Pasadena Investment Co. v. Peerless Casualty Co.*, at page 331. From this quotation, it will be immediately seen that the situation in the *Bendit* case is almost precisely the same as that which is involved in this litigation.

" . . . In *People v. Bendit*, 111 Cal. 274 [43 P. 901, 52 Am. St. Rep. 186, 31 L. R. A. 831], without authority, defendant collected an account owed by one company to another and receipted for the cash by writing the company name with his own thereunder. At page 276, the court said:

" 'It is quite clear that the facts above stated do not constitute forgery. When the crime is charged to be the false making of a writing, there must be the making of a writing which *purports to be the writing of another*. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, *or a false as-*

sertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such other person. The instrument must fraudulently purport to be what it is not.' " (Last emphasis added.)

The *Peerless Casualty* case itself is likewise in point. This case, applying the *Bendit* decision, holds, at page 331:

"The invoices and receipts, alleged by the complaint in the instant action to have been forged, appear from the other allegations of the complaint to have been made by the parties purporting to have made them. They are not forgeries. . . ."

To apply this same rule to the present litigation, it is necessary to hold that there has been no forgery, since the document was signed by the individual purporting to have signed it.

The distinction which Appellee is making, that there is a difference between the signing of an instrument where the one signing has authority to sign, although he may have no authority to take the funds so acquired, and the situation where one signs another's name without any authority to do so, is one which is well recognized by the authorities in California. In the former situation, there is an unauthorized act by the signer in that he may take the funds for purposes other than that which his principal intended, but there is no forgery. In the latter situation, however, there is a forgery, because there never was any authority to sign another's name.

Appellant, in its Brief, relies on California authorities which are either not in point or are misinterpreted by Appellant. Appellant cites *People v. Rushing*, 130 Cal.

450, and quotes from it at some length on pages 17 and 18 of its Brief. What Appellant fails to express, however, is that the *Rushing* case finds a forgery to have been committed because, in a legal sense, the one signing the power of attorney was not actually signing his own name. In that case, the power of attorney was signed "E. Geddes." Although the one signing it was, in fact, named *Elmer* Geddes, the defendant had used the instrument to cash a check which had been drawn in favor of another "E. Geddes," whose name was in fact *Edwin* Geddes. Since the defendant *Rushing* had no power of attorney from the E. Geddes who was intended as the drawee of the check, *Rushing*, in fact, had no authority to sign the name "E. Geddes" on any papers relating to *Edwin* Geddes. The law has always been in accord with the *Rushing* case, or at least it has been for centuries, and it is improper to assert that the *Rushing* case indicates any departure from the view and opinion set forth in the *Bendit* case.

Appellant also relies on *People v. McKenna*, 11 Cal. 2d 327. This decision likewise fails to support its position. Appellant seems to rely particularly on the language at the bottom of page 332. On that page the court states that "the crime of forgery consists either in the false making or alteration of a document." This decision adds absolutely nothing to the Appellant's argument, since the "false making or alteration of a document" was a forgery even prior to the change made in Section 470. Incidentally, in the *McKenna* case, the defendant had apparently created a completely false photostatic copy of a document which had never even existed. This had been produced by photographing several different writings and then, apparently, putting them together through some method of "trick photography." Also the defen-

dant had added extremely important phraseology to a document after it had been signed by another. In other words, the defendant had falsely made a document, and had also altered a document.

The case of *Kiekoefer v. U. S. National Bank*, 2 Cal. 2d 98, is relied on by Appellant, although, again, without justification. At page 108, the court says:

“ . . . *As Palmer had the legal right to sign plaintiff's name to said endorsement, his act in so doing was, of course, not a forgery.* Forgery is defined as the signing by a person of another's name knowing that he has no authority so to do. (Pen. Code, sec. 470.) Palmer could not know that he had no such authority when he in fact had such authority.” (Italics added.)

Obviously, the “such authority” referred to is the authority to sign the other's name. In the instant litigation, Alden had the authority to sign the other's name, or, to put it more correctly, he had the authority to sign for his principal. It is the authority to *sign* another's name with which the cases are concerned in determining whether or not a forgery has been committed. They are not concerned with whether or not the particular act of the signer was beyond the scope of his authority as an agent, so long as he did have the authority to sign the other's name. It is confusion on this point which has led the Appellant to its improper contentions and erroneous conclusions.

Another California case relied on by Appellant is *People v. Caldwell*, 55 Cal. App. 2d 238. In certain respects this opinion is not as clear as it might be. In the first place, it appears that the defendant was convicted of both

forgery and five different counts of grand theft. At page 244, the court states:

“The fact of forgery was established by the testimony of Mr. Williams that he did not sign his own name to the certificate or to the endorsement and that he authorized no one to do so.”

This would appear to be the decision of the court with respect to the question of forgery, and it is, of course, clearly in line with the position taken by this Appellee in this instant litigation. Later discussions in the case would appear to be *dicta* and, in any event, may relate to the accusations of grand theft, rather than to the accusation of forgery. Therefore, it is submitted that there is nothing in the *Caldwell* case which actually supports the position of Appellant.

People v. McPherson, 6 Cal. App. 266, is also cited by Appellant in its Brief. Appellant seems to rely particularly on language at page 269, in which the court states that the information is not defective, even though one cannot tell from reading it whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed. Since forging a fictitious deed would constitute “falsely making,” that would, of course be within Section 470 of the Penal Code, as would the signing of another’s name by the defendant. It is difficult to determine why the Appellant has bothered to cite this case. It is submitted that the case would not in any way support the Appellant’s position.

Perhaps one last California case should be discussed. It is *Torrance National Bank v. Enesco Federal Credit Union*, *supra*. In that case, the court, at page 328, held that the defendant was not obliged to help the bank recoup its \$30,000 loss, or any part of it, which resulted

after Mr. Alden had been robbed. *That case does not hold that there was a forgery.* It specifically states that the *transaction was unauthorized*, and it adds, “The fact that any check in an amount less than or up to the amount of the deposit would have been authorized does not alter the fact that the check involved in the instant case was unauthorized.” That court apparently had in mind the distinction which has been reiterated throughout this Brief, namely, that there is a difference between an unauthorized check or transaction and an unauthorized signature or signing. *In view of the language just quoted from that case, if the court in the instant litigation were to find that a forgery had been committed, then it would be espousing the untenable position that, whether or not a forgery existed would depend upon whether or not there were sufficient funds on deposit in the account to cover the check.*

C. There Was No Attempt to Defraud, and Therefore, There Was No Forgery.

As previously stated, Penal Code Section 470 states that “intent to defraud” is a necessary element of the crime of forgery. (See also *People v. Meldrum*, 2 Cal. 2d 52.) Without belaboring the point, it is undoubtedly true that Alden lacked intent to defraud the bank. The entire past practice which had been built up over a period of several years indicated that he had every intention of seeing that the bank got back the \$30,000 that it was paying to him. The bank knew the purpose for which he intended to use the funds and was, in fact, extending credit to him for that purpose. This presents a second reason why there could be no forgery in this case. Incidentally, Appellant has stated in its Brief that there was no evidence that the bank knew the purpose for which

Alden was using the funds which it supplied to him. This is an inaccurate statement, since there was specific, unfuted testimony by Alden that he told them that he was using the funds for his own personal check-cashing business. [R. 21.]

Conclusion.

Appellee submits that the decision of the trial court in the instant case was entirely correct, and, actually, the only decision which it could properly have rendered. The facts clearly establish that there was no forgery, since Alden had full and complete authority to sign checks on behalf of his principal. At most, the transaction constituted an unauthorized act on the part of Alden. He was not signing *another's* name without authority so to do. In addition, Alden had no intent to defraud, and therefore, no forgery was committed.

Respectfully submitted,

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GARVIN F. SHALLENBERGER,

Attorneys for Appellee.

No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Appellant originally filed this action for declaratory relief in the Superior Court of California. Thereafter, appellee had the case transferred to The District Court of the United States, Southern District of California, Central Division, on the ground of diversity of citizenship, because while plaintiff was a citizen of California, the defendant's state of incorporation was Connecticut.

After such transfer, appellant filed an Amended Complaint in which it pleaded certain matters more specifically and sought declaratory relief as to the controversy concerning appellee's liability under its forgery bond. Subsequent to this, appellant filed an amendment to such

Amended Complaint wherein a Paragraph IIA was added to include the essential allegations of jurisdiction. In that amendment it was alleged that jurisdiction was conferred by Section 1332(1) of the Judicial Code (Title 28, U. S. C. A.), by reason of diversity of citizenship and because the amount in controversy exceeded \$3,000.00. It was further alleged that the remedial statutes which were applicable were Sections 2201 and 2202 of the Judicial Code. (Title 28, U. S. C. A.) These sections empower the court to grant declaratory relief in controversies such as the one involved herein. Section 2202 also empowers the court to grant such necessary and proper relief upon its declaratory decree in order to render complete justice in the litigation. It has been held that this section empowers the court to direct a money recovery pursuant to the declaratory relief judgment.

See:

Texas Steel Mfg. Co. v. Seaboard Sur. Co. (C. A. Tex.), 158 F. 2d 90;

Goldsmith Metal Lath Co. v. Milcon Steel Co. (D. C. Del.), 53 Fed. Supp. 778;

Damko v. Shell Oil Co. (D. C. N. Y.), 115 Fed. Supp. 886.

Although the action was originally filed under the state declaratory relief statutes (Code Civ. Proc., Sec. 1060), it appears that, once the case was properly removed to the federal court, the federal statutes on declaratory relief should govern because these are procedural matters, and the declaratory relief statutes are precedural in nature.

See:

Aetna Life Ins. Co. v. Howarth, 300 U. S. 227,
57 S. Ct. 461 at 463;

New Amsterdam Casualty Co. v. Berger (D. C.
Mich., 1945), 59 Fed. Supp. 994 at 995;

Skelly Oil Co. v. Phillips Petroleum Co., 339 U. S.
667 at 671, 70 S. Ct. 876 at 879;

West Pub. Co. v. McColgan (C. C. A. 9th), 138
F. 2d 320 at 324;

National Valve & Mfg. Co. v. Grimshaw (C. C. A.
10th), 181 F. 2d 687;

Borchard on Declaratory Judgments (2nd Ed.),
at p. 231.

Jurisdiction of this appeal is conferred by Section 1291 of the Judicial Code (Title 28, U. S. C. A.), in that the judgment appealed from is a final decision of the District Court above mentioned.

Statement of the Case.

This action was instituted for the purpose of obtaining a declaratory judgment concerning the liability of appellee under a forgery bond which it had issued to appellant prior to the forgeries hereinafter described. The bond contained four riders, one of which was the one under which the liability asserted by appellant herein was assumed by the appellee. (Rider "D".) This rider recited that the bond was extended to cover:

"Any loss (1) through accepting, cashing or paying forged or altered checks, drafts, acceptances, withdrawal orders or receipts for the withdrawal of funds, certificates of deposit, letters of credit, warrants, money orders, or orders upon public treasuries, or any of said instruments bearing forged

endorsements, acceptances or certifications, or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, drafts, acceptances, orders, receipts, letters of credit, warrants or certificates, or (3) through transferring, paying, or delivering any funds or property or establishing any credit or giving any value on the faith of any written instructions or advices, directed to the Insured, authorizing or acknowledging the transfer, payment, delivery or receipt of funds or Property, which instructions or advices purport to have been signed or endorsed by any customer of the Insured or by any banking institution but which instructions or advices either bear the forged signature or endorsement or have been altered without the knowledge and consent of such customer or banking institution, . . .” [R. 30-31.]

Subsequent to the execution and delivery of the bond* and the riders, and on the 2nd day of April, 1954, appellant paid out \$30,000.00 in currency to one Joseph Alden on a check signed by Joseph Alden as the Treasurer of Enesco Federal Credit Union. [R. 31-32.] The name of Enesco Federal Credit Union was printed at the top of the check and at the bottom under the line on which Joseph Alden signed his signature was printed the word “Treasurer.” For convenient reference, a photostat of the check is embodied in this brief.

*“The bond and its four riders were attached to the appellant’s Amended Complaint and their existence was admitted by the appellee’s pleadings, so they did not go into evidence as exhibits. In printing the original record, there was an omission in failing to include these exhibits to the Amended Complaint, they were later inserted in the record at pages 12-A to 12-D.”

TORRANCE NATIONAL BANK

1329 SARTORI AVENUE
TORRANCE, CALIFORNIA

TELEPHONES:
TORRANCE 711 } EXT. 425
L.A.-NEVADA 6.1701

APRIL 3, 1955
VOID AFTER 60 DAYS
1505 S.W.

Enesco Federal Credit Union

1524 BORDER AVENUE . . . TORRANCE, CALIFORNIA

CHARTER 2228

\$ **30,000.00**

PAY TO THE TORRANCE NATIONAL BANK
ORDER OF.

30000 DOLS AND CTS

KNOW YOUR ENDORSER
REQUIRE IDENTIFICATION

Joseph R. Alden
TREASURER

90800
1222

The trial court found that Joseph Alden had been at all times the Secretary-Treasurer and General Manager of Enesco Federal Credit Union. [R. 31.] It also found that Joseph Alden “signed the said check as Secretary of Enesco Federal Credit Union.” [R. 31.] It found that when Joseph Alden presented the check to appellant after banking hours on April 2, 1953, appellant had paid him the \$30,000.00 in currency called for. [R. 32.] It found that the cashing of this check was in accordance with a long established practice by which Joseph Alden would, on Thursday of each week after the close of business by appellant, bring to appellant a check drawn on Enesco Federal Credit Union’s account signed by Joseph Alden as Secretary of Enesco Federal Credit Union, and that he would exchange the check for currency in an amount equal to the face amount of the check. [R. 32.] It found that he used the currency which he would receive on each occasion to cash payroll checks for employees of National Supply Company, the employees of which had formed the said Enesco Federal Credit Union. [R. 32.] The court then found that Enesco Federal Credit Union had not authorized the use of any of its funds to carry on the check cashing operations of Joseph Alden, and that Joseph Alden had carried on the check cashing operations on premises assigned to Enesco Federal Credit Union at National Supply Company’s plant in Torrance, and that Joseph Alden had made a charge for the cashing of such payroll checks which was kept by him because he was carrying on this check cashing operation for his own personal gain. [R. 33.]

The court then makes a somewhat ambiguous finding to the effect “that the plaintiff bank knew the purpose for which the currency so secured by said Joseph Alden was being used, but did not know that the said Joseph

Alden lacked authority to so use the funds; . . .” [R. 33.] It is not quite clear from this finding whether the trial court intended to find that the appellant knew that Joseph Alden was using the funds for the purpose of cashing checks in connection with his employment by Enesco Federal Credit Union, or whether appellant knew that he was actually using the funds for his own private business operation of cashing checks.

The trial court then found that the appellant would hold each of the weekly checks which it received without processing them through its books and records until the Monday following the presentation of the same, and that on Monday Joseph Alden would deposit the checks which he had cashed to an account which he maintained with appellant under the name of Enesco Service Fund, and would then write a check on Enesco Service Fund payable to plaintiff in an amount sufficient to cover the check. [R. 33.] It found that by this means appellant’s records did not reflect these withdrawals and repayments on the Enesco Federal Credit Union ledger. [R. 33.] It found that on April 2, 1953, when the particular check involved in this action was presented, that Enesco Federal Credit Union had only a balance in its account of \$10,483.07. [R. 31.] The court then found that after receiving the money on April 2, 1953, and while returning to his place of business, Joseph Alden was robbed of the \$30,000.00 in currency which he had received, and that appellant had thereupon instituted an action in the State Superior Court against Enesco Federal Credit Union to recover the balance on the \$30,000.00 check, but that such case was decided adversely to appellant, and is reported in 134 Cal. App. 2d 316. [R. 34.]

The court then found that there was a controversy between the parties, in that appellant contended that ap-

pellee was obligated under its rider to reimburse appellant for the amount of its loss up to the limits specified in such rider, that is, up to \$10,000.00, and that the appellee disputed such contention. [R. 34-35.] The trial court then concluded that the appellee was correct in its position in that the check was not a forged instrument within the meaning of the rider or the law of the State of California, and that appellant had "suffered no loss through the accepting, cashing or paying of any forged check or instrument, or for any other cause which is covered by" the bond or any of its riders, and that, therefore, appellant was not entitled to any recovery, but the appellee was entitled to a decree to the effect that it had no liability under the bond or any of the riders. [R. 35-36.]

The findings of fact are generally in accord with the evidence, except in the following particulars:

1. The evidence showed that Joseph Alden would reimburse appellant for the moneys which it paid out on each of these checks on the Friday following the Thursday that he received the money, instead of on Monday as found by the court. [R. 47-48.]

2. If the court intended to find by the previously mentioned ambiguous finding that appellant knew that Joseph Alden was using the moneys which he would receive in a personal business of his own as distinguished from the business of Enesco Federal Credit Union, then such a finding would not be supported by the evidence, as there is no evidence to show that the appellant knew that the check cashing operation was a personal business of Joseph Alden, as distinguished from Enesco Federal Credit Union. Even though there was evidence to support a finding that some officer or employee of appellant knew that Joseph Alden was using the proceeds of these checks

in his personal check cashing business, we do not believe that this would exonerate the appellee under its bond, and we will deal with the legal phases of this under a separate subdivision of this brief.

Several years prior, this check cashing activity was conducted by Joseph Alden as part of the business of Enesco Federal Credit Union for the convenience of its members, but it had been directed by a Federal Examiner to discontinue that operation as not being one of the operations permitted by the law relating to these associations. [R. 97-98.] Thereupon, the Directors of Enesco Federal Credit Union permitted Joseph Alden to continue the check cashing operations on the premises, provided that he supplied his own financing of the moneys necessary to carry on such operation. [R. 91, 92 and 98.] Joseph Alden had represented to these Directors that he had made financial arrangements with the appellant bank under which he had become a bonded messenger of appellant bank in utilizing its moneys in these activities. [R. 91 and 98.] This statement was untrue and Joseph Alden had not made any other or different arrangement with appellant bank for the cashing of checks, except that in order to conceal from his employer the fact that he was using its checks to obtain the currency needed to cash the payroll checks, he had caused to be printed a series of unnumbered checks showing the name Enesco Federal Credit Union. [R. 98.]

By the use of such unnumbered checks and the exchanging of the payroll checks on Friday for the check which

he customarily left at the bank on Thursday, he was able to avoid detection as no entries of the transactions were made on the bank ledgers with respect to the account of Enesco Federal Credit Union, or in the record of Enesco Federal Credit Union. At the same time, the appellant bank continued to believe that the check cashing operation was still an activity of Enesco Federal Credit Union as it had been in the original instance. [R. 101 and 102.]

Pending the determination of the action in the State Courts against Enesco Federal Credit Union the within action remained dormant by stipulation of the parties, with the approval of the District Court, because if appellant had been successful in recovering its loss from Enesco Federal Credit Union there would have been no purpose in going forward with the present action against appellee. When the District Court of Appeal decision became final, this declaratory relief action was again activated and brought on for trial on November 28, 1956. The case was finished on that date and taken under submission by the trial court. On March 28, 1957, the trial court filed a memorandum decision directing that a judgment be entered in favor of the appellee on the ground that the signing by Joseph Alden of his own name as Treasurer of Enesco Federal Credit Union was not a forgery, even though Joseph Alden lacked authority to sign the check on behalf of Enesco Federal Credit Union. [R. 21-27.] The court held that he did lack authority to sign such check, but it failed to apply the existing law of the State of California with respect to what constitutes

a forgery. Instead, it applied the doctrine of a case decided in 1896 before the present Section 470 of the California Penal Code had been amended to include within the definition of forgery, the signing without authority.

The court also relied upon another decision which did not even involve the signing of a document without authority, and, of course, in reaching that decision the trial court not only ignored the existing statutory law, but it refused to follow the numerous decisions in California holding that the signing without authority constitutes forgery. The court recognized that the matter was to be resolved by the definition of forgery under the laws of the State of California. It recognized that *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, was applicable to the substantive law.*

Appellant's Specification of Errors.

The errors of the District Court may be summarized as follows:

1. The basic error was the District Court's determination that the signing by Joseph Alden of the \$30,000.00 check as Treasurer of Enesco Federal Credit Union was

*In doing this, the court, nevertheless, misstated the position of appellant's counsel with respect to *Erie Railroad Co. v. Tompkins*. Apparently the trial court had observed in one of the earlier briefs which had been filed in opposition to a motion of appellee to dismiss, a statement that *Erie Railroad Co. v. Tompkins* did not apply to procedural matters and that the federal declaratory relief statutes governed the procedure as distinguished from the state declaratory relief statute. This is the only point for which appellant's counsel had cited the case of *Erie Railroad Co. v. Tompkins*, and there never was any contention by any counsel during the trial of the case that the state substantive law with respect to forgery was not applicable. On the contrary, this was assumed by all parties.

not a forgery for the reason that the signing in behalf of another party without authority was not a forgery under the law of California.

2. If the District Court, by its ambiguous finding, intended to find that appellant knew that Joseph Alden was using the moneys which he obtained from appellant in connection with his personal check cashing business, then such finding is not supported by the evidence.

3. Even though there was evidence to sustain a finding that appellant knew that the checks were being cashed for Joseph Alden's personal use, this would not exonerate appellee under its bond and the Court erred in making any contrary determination.

4. The District Court erred in finding that Joseph Alden would redeem his check on the Monday following the Friday that he obtained the currency. The evidence conclusively shows that he did this on Friday following Thursday. While this error appears to have had no effect in causing the erroneous determination of the Court, we, nevertheless, mention it in the event it should be urged that this difference in time had any significance.

Statement of Questions of Law Involved.

There are two questions of law involved in this case, although the trial court in its memorandum decision seems to have overlooked one of these. These questions of law are as follows:

1. Where a party signs a check as agent for a principal when he has no authority to sign such check, does

that constitute a forgery? In other words, does the signing without authority constitute a forgery?

2. Assuming that an agent has general powers to sign checks on his employer's bank account in connection with the activities and business of the employer, is it a forgery where an agent signs a check on the employer's account for the purpose of obtaining funds for the agent's personal use? It was this latter question which the trial court seems to have overlooked in its memorandum decision, although this appeared to be the sole question when the matter was orally argued at the conclusion of the trial on November 28, 1957. [R. 111-119.]

3. Did not the District Court err in relying upon a decision which involved forgery committed before the amendment to Section 470 of the Penal Code, which amendment made the signing without authority a forgery?

4. Did not the District Court err in failing to apply the rule that if there was any uncertainty in the meaning of the bond, such uncertainty should have been resolved against the appellee who drafted the bond?

5. Would the appellee be excused from liability if an officer of appellant had known that Joseph Alden intended to misappropriate the moneys which he received from the forged check?

ARGUMENT.

I.

The Signing by Joseph Alden of the \$30,000.00 Check as Treasurer of Enesco Federal Credit Union Was a Signing Without Authority, and, Therefore, a Forgery Within the Meaning of Appellee's Bond and the Law of the State of California.

We have already quoted the full language of the rider in an earlier portion of this brief. The applicable portions of the rider are as follows:

"Any loss (1) through . . . , cashing or paying forged . . . checks, . . . , or (2) through the establishment of any credit to any customer or the giving of any value on the faith of such checks, . . . or (3) through . . . paying, or delivering any funds . . . or establishing any credit or giving any value on the faith of any written instructions or advices, directed to the Insured, authorizing . . . payment, delivery or receipt of funds . . . which instructions . . . purport to have been signed or endorsed by any customer of the Insured . . . but which instructions . . . bear the forged signature"

The language is extremely broad. The only requirement for liability is that the check or document be forged. There is no definition of forgery in the bond, so we must look to the law of California, where the bond was issued, for a definition of "forgery." Applicable statutes are read into the contract as fully as though they had been expressly embodied therein.

See:

Gally v. Wynne, 96 Cal. App. 145 at 148;

Marshal v. Wentz, 28 Cal. App. 540 at 542;

Thomas v. Wentworth Hotel Co., 158 Cal. 275 at 280;

People v. N. Y. Indemnity Co., 113 Cal. App. 487 at 490;

People v. Page, 100 Cal. App. 252 at 254.

Forgery is defined in Section 470 of the California Penal Code. The applicable language of that section is as follows:

“Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any . . . check . . . or request for the payment of money, . . . is guilty of forgery.”

There are many decisions in California which state the rule that the signing without authority constitutes a forgery.

See:

People v. Rushing, 130 Cal. 449 at 451, *et seq.*;

Keikhoefer v. U. S. Nat. Bank, 2 Cal. 2d 98 at 108;

People v. McKenna, 11 Cal. 2d 327 at 332;

People v. Caldwell, 55 Cal. App. 2d 238 at 245;

People v. McPherson, 6 Cal. App. 266 at 269.

The trial court in its Memorandum of Decision mentioned the cases of *People v. McKenna* and *People v. McPherson* (*supra*), but it sought to distinguish them by stating that they were “substantially different in that defendant actually signed the name of another without authority, instead of, as in the case now being decided, signing his own name for an unauthorized purpose.”

It would be unfortunate if a forgery turned upon any such an artificial distinction. There are at least two ways in which a purported agent who is acting without authority can forge a check or other instrument. The following are examples:

1. *Signing only the purported principal's name.* The agent, John Doe, can merely sign the name of his purported principal, Richard Roe, without signing his own name at all. This was the type of forgery involved in the case of *People v. McPherson*, 6 Cal. App. 266, and *People v. Caldwell*, 55 Cal. App. 2d 238.

In *People v. McPherson*, *supra*, the defendant had merely written the name of another to the instrument, and the court in holding that this constituted a forgery, said at page 269:

“The information is not defective because it cannot be determined therefrom whether the charge is for forging a fictitious deed or signing the name of James Wallace to the deed.”

In *People v. Caldwell*, *supra*, the defendant Caldwell had affixed the name of Williams to certain insurance policies which he had no authority to issue in behalf of the insurer to the insured. It does not appear from the opinion whether the name was affixed by typewriting or by handwriting. Caldwell had retained the premiums which he had received from the insured on account of these policies. One of Caldwell's defenses was that an old authorization which he had was still in effect, but the court held that even if such old authorization had continued to exist, it would not constitute a defense, and in this connection the court said at page 245:

“A further answer to such argument is that the authority to sign instruments executed in the pur-

suit of lawful transactions could imply no more than for appellant to sign certificates after he had first placed the required insurance with Lloyd's underwriters. Since no insurance was ever placed, as we shall presently see, there arose no occasion for the exercise of such authority if it had continued to 1940. *Neither can it be said that any authority could have been implied for appellant to do a criminal act unless it had been first established that the two had conspired together to commit such crime.*" (Italics ours.)

In the last sentence of the above quoted language, the court says that even though Caldwell did have authority to sign policies, such authority did not include the signing of policies where Caldwell never intended to remit the premiums to the insurer, but intended to retain them himself. The case differs only in that it involved forged insurance policies, whereas we are concerned with a forged check.

2. *The agent's signing of his own name below the typewritten, printed or handwritten name of the purported principal.* The purported agent can sign his name in an agency capacity below the name of the purported principal. Whether this principal's name has been printed, typewritten or signed on the instrument should make no difference in determining whether there is a forgery. In each instance the fact that the agent has signed his name below indicates that he is purporting to act as the principal's representative. Such a method shows that the name of the principal was not written by the principal, otherwise there would be no purpose at all in the agent writing his name below.

The case of *People v. Rushing*, 130 Cal. 449, deals with a situation where one of the forged documents, a

check, was signed "E. Geddes, by his attorney in fact, W. E. Rushing." In that case one Edwin Geddes had an account in a bank which later went into liquidation. The account was evidenced by a bank book showing it to be carried in the name of E. Geddes. Upon the suspension of the bank's activities, Geddes assigned this account to the First National Bank of Fresno for collection. The defendant then procured a general power of attorney from a totally different E. Geddes and sold the account evidenced by the above mentioned bank book to one Levy. The check of Levy was drawn payable to the order of E. Geddes. The defendant took the check to the bank and cashed it after endorsing it "E. Geddes, by his attorney in fact, W. E. Rushing." Among the questions raised was whether the power of attorney which the defendant used to defraud Levy by inducing him to purchase the account which the defendant did not own, and which the E. Geddes who signed the power of attorney did not own, had committed a forgery. The defendant contended that since the name of the man signing the power of attorney was actually E. Geddes, that there was no forgery, but in answer to this the court said at page 452:

"We do not so understand the law. Every person who, with intent to defraud another, falsely makes, utters or publishes a power of attorney, knowing the same to be false or forged, is guilty of forgery. (Pen. Code, Sec. 470.)

"A man may be guilty of forgery by making a false deed or instrument in his own name, if the name was placed upon the instrument with the fraudulent intent of throwing the *onus* of the obligation upon another, and of making the writing purport to be the writing of another. A man who forges another's name cannot excuse himself upon the ground

that the name happened to be identical with his own. (2 Bishop's New Criminal Law, Sec. 587; 2 Russell on Crimes, 9th ed., 718 et seq.; *People v. Peacock*, 6 Cow. 72; *Barfield v. State*, 29 Ga. 127.) Because the initial of Elmer Geddes' name is 'E', he will not be allowed to forge the name of every other Geddes in the state whose initial might be 'E', and in defense claim that he was only signing his own name. If the power of attorney was made and signed by Elmer Geddes for the fraudulent purpose of getting the money of Edwin Geddes, which was on deposit in the bank, and if defendant knew all these facts and uttered the power of attorney for the purpose of making the sale to Levy, knowing that Levy believed it to be the power of attorney of Edwin Geddes, he committed the crime of forgery."

The forgery involved in the case at bar falls within this second category, except that instead of Enesco Federal Credit Union's name being printed or typed on the check immediately above Joseph Alden's signature as Treasurer, Enesco Federal Credit Union's name is printed at the top of the check so as to indicate that it is a check of Enesco Federal Credit Union. Then, under the line on which Joseph Alden signed, there was printed the word "Treasurer." It would not seem that the failure of the forger to sign his name immediately under that of his purported principal should have any effect upon the forgery.

It is apparent from the above decisions that the signing by Joseph Alden of the check was a forgery, as fully as though he had merely written the name "Enesco Federal Credit Union" on the check. The fact that he used a check that had Enesco Federal Credit Union's name printed on it so as to render it unnecessary for him to write that name on the check, does not alter the situation.

II.

Where an Agent Authorized to Sign on His Principal's Account Does so for the Purpose of Obtaining Moneys for His Personal Use, This Constitutes a Forgery.

The fact that the agent was authorized to sign on the account does not mitigate the act insofar as its being a forgery is concerned where he uses the check for the purpose of obtaining proceeds for his personal use. The case of *People v. Caldwell*, 55 Cal. App. 2d 238, points this out in holding that such an authorization does not constitute authority to sign checks to obtain money for the agent's personal unauthorized use.

There are many other decisions laying down the same rule as that applied in *People v. Caldwell, supra*. In *State v. Sotak*, 100 W. Va. 652, 131 S. E. 706, the court states the rule at page 708 as follows:

“But there is an abundance of authority that an agent may commit forgery by making or signing an instrument in disobedience to his instructions or in the improper exercise of his authority. Ex parte Hibbs (D. C.), 26 Fed. 421; *Moore v. Com.*, 92 Ky. 630, 18 S. W. 833; *People v. Dickie*, 62 Hun. 400, 17 N. Y. Supp. 51; *Flower v. Shaw*, 2 Car. & K. 703; *Merchants Bank & T. Co. v. People's Bank, supra.*”

See also:

Quick Service Box Co. v. St. Paul Mercury Indem. Co. (7th Cir.), 95 F. 2d 15 at 17;

Yeager v. United States (C. C. A. Dist. of Col.), 32 F. 2d 402, and other cases cited therein.

When a principal authorizes his agent to sign checks he does not authorize the use of such checks for the agent's

personal business. The authority is not an unlimited one permitting the agent to distribute the employer's funds around at the agent's pleasure. Whenever the agent goes beyond the principal's authorization and, instead of signing checks for the purposes authorized by the principal, signs them to obtain funds for himself or for his friends it is an "unauthorized" signing and a forgery just as much as though there had never been any agency relation at all.

We are not dealing with a situation where ostensible agency has any application at all. That doctrine applies only where the principal has held the agent out to third parties as having general powers, and such third parties have no actual knowledge that the agent is using the funds for his personal use.

"A common example of ostensible authority arises when a principal puts his agent in charge of a business as the apparent manager. In such a case, the agent is clothed with ostensible authority to do all things essential to the ordinary conduct of the business at that place, and third persons, acting in good faith and without notice of, or any reason to suspect, any limitations on the manager's authority, are entitled to rely on appearances."

2 Cal. Jur. 2d, Agency, p. 703.

Appellee is not such a third party as is entitled to invoke the doctrine of ostensible agency. The third party who would have been able to benefit by such doctrine was appellant who cashed the checks believing that Alden was using their proceeds in connection with the business of his principal. Even then the District Court of Appeal

denied appellant the advantages of such a rule in *Torrance National Bank v. Enesco Federal Credit Union*, 134 Cal. App. 2d 316. There is much less reason why an insurer such as appellee should be permitted to escape liability because the forgery was committed by an agent who intentionally exceeded his authority instead of by one who had no authority at all.

The contract liability of appellee under its bond should not turn upon whether the wrong arose from a purposeful excess of authority, or whether it arose from an assumption of authority where there was no authority of any kind.

Before proceeding to another subject, it should be again noted that Section 470 of the Penal Code, in defining forgery, includes the signing of the name of another person by one, "knowing that he has no authority so to do."

It is clear from the evidence and from the findings of fact that Joseph Alden did not have authority to draw upon Enesco's bank account in order to obtain funds for his personal use. [R. 32.] Two officers of Enesco Federal Credit Union testified that Joseph Alden had been specifically instructed that he could continue the check cashing business as his own, provided that he could make some arrangement for the financing of that business. These instructions were given him after Enesco Federal Credit Union had been required to discontinue that business as its own by the Federal Examiner. [R. 88-99.]

III.

The District Court Erroneously Relied Upon Authorities Which Were Either Not in Point, or Which Were Decided Prior to the Amendment to Section 470 of the Penal Code, Making Signing Without Authority a Forgery.

The court in its memorandum decision, relied particularly upon the case of *People v. Bendit*, 111 Cal. 274, in support of its ruling that the signing of the name of another without authority was not a forgery. That case was decided in 1896, at which time Section 470 of the Penal Code did not include in the definition of forgery the signing of another's name without authority. For the convenience of the court we are including in the appendix of this brief a copy of that section as it existed at the time that the decision in the case of *People v. Bendit* was made.

In 1905 Section 470 of the Penal Code was amended so as to include the signing without authority. (Calif. Stats., 1905, p. 673.)

Having erroneously assumed that the rule of *People v. Bendit* is still the law of this state, the court proceeded to misinterpret a later case in California which did not even involve a situation where a person had signed the name of another without authorization. That was the case of *Pasadena Investment Co. v. Peerless Casualty Co.*, 132 Cal. App. 2d 328. In that case the defendant Nilsson had been doing business under the fictitious name of Haveles Manufacturing Company. He signed that name to certain fictitious invoices which he, in turn, sold to Pasadena Investment Co. on the basis that they were genuine invoices representing sales. Pasadena Investment Co. filed suit to recover against Peerless Casualty

Co. on its forgery bond, and contended that since the invoices were fictitious, in that they did not represent actual sales at all, that they were forged documents which gave rise to a right to recover on the forgery bond. There was no question of agency involved in that case at all. The matter of signing the name of someone else without authority was not even before the court. Unfortunately, the court in that case in quoting from the case of *People v. Bendit* for the purpose of showing that a fictitious or false instrument was not necessarily a forgery, included in the quoted language the statement that the signing of another's name without authority was not a forgery, however, in order to illustrate that the court was not attempting to adopt such a rule in the Pasadena Investment Co. case, the court immediately thereafter quoted from *People v. McKenna*, 11 Cal. 2d 327 at 332, as follows:

“The crime of forgery consists either in the false making or alteration of a document *without authority* or the uttering (making use) of such a document with the intent to defraud.” (Italics ours.)

If the court had intended to lay down a rule that signing without authority could not be a forgery, it would have either attempted to distinguish the case of *People v. McKenna*, *supra*, or it would not have quoted it at all. The court in that case was aware of the fact that it did not have that particular issue before it at all, and that the only issue which it had was whether the signing of a false or fictitious document was a forgery. The specific holding of the court is set forth at page 331, as follows:

“The invoices and receipts, alleged by the complaint in the instant action to have been forged, appear from the other allegations of the complaint to have been made by the parties purporting to have

made them. They are not forgeries. Such invoices and receipts not being forgeries, the alleged acts of the Nilssons in using them to evidence accounts receivable sold by them to Pasadena do not constitute forgeries.”

IV.

The District Court Erred in Failing to Apply the Rule That if There Was Any Uncertainty in the Meaning of the Bond, It Should Have Been Resolved Against the Appellee Who Drafted the Bond.

We have already quoted the applicable language from the rider to demonstrate that it covers every conceivable type of forgery. We have shown that the type of forgery involved in this case is specifically covered by the statutory definition of forgery in Section 470 of the Penal Code, and we have also shown that the courts of the state of California have held that signing without authority is a forgery. Even though there was any doubt about the bond being sufficient to cover a forgery, which we believe there was not, the District Court should have construed the rider liberally in favor of the contention urged by appellant, instead of construing it liberally in favor of appellee insurer.

This rule is stated in 27 Cal. Jur. 2d, Insurance, Section 276, at page 773, as follows:

“The statement that insurance policies are to be liberally construed in favor of the insured, and most strictly against the insurer, is rarely made in this unqualified form. But propositions to that effect are recurrent in judicial opinions dealing with insurance cases. Foremost among them is the rule that since an insurance policy is drawn by the insurer, and since the insurer is bound to use such language as to make

the provisions of the contract clear to the ordinary mind, any ambiguity, uncertainty, or reasonable doubt is to be resolved by a construction in favor of the insured, or of the beneficiary claiming under the policy. Another frequent expression of the rule is that where the language is reasonably susceptible of two constructions, it should be construed in favor of the insured. A similar statement often made is that an insurance policy must be so construed, if fairly warranted, as best to carry out the object of securing indemnity to the insured for losses to which the insurance relates, rather than to narrow the protection of the policy."

In *Provident Trust Co. v. National Surety Co.*, 44 Fed. Supp. 514, the court stated the same rule at page 515, as follows:

"In *Sidebotham v. Metropolitan Life Insurance Company*, 39 Pa. 124, 127, 14 A. 2d 131, 132, it is stated: 'It is true that there is a generally accepted rule of construction that, where doubt exists as to its meaning, an insurance policy, couched in language chosen by the insurer, is to be given the construction of which it is susceptible most favorable to the insured . . .' See *Morris v. American Liability & Surety Company*, 322 Pa. 91, 185 A. 201; *Stroehmann et al. v. Mutual Life Insurance Company of New York*, 300 U. S. 435, 57 S. Ct. 607, 81 L. Ed. 732."

V.

Even Though a Representative of Appellant Had Known That Joseph Alden Was Using the Moneys for His Personal Check Cashing Business, This Would Not Defeat Appellant's Right to Recover on the Forgery Bond.

We have already noted the District Court's finding to the effect that the appellant knew the purpose for which the currency was being used by Joseph Alden, but that it "did not know that the said Joseph Alden lacked authority to so use the funds." [R. 33.] One reason that this finding is ambiguous is that it does not take into consideration the law with respect to an agent using his principal's funds. The rule is well established that a corporate employee or officer cannot utilize corporate funds for his own personal ventures. (13 Cal. Jur. 2d, Corporations, p. 121, *et seq.*) In this instance the law with respect to federal credit unions precluded Joseph Alden from borrowing any such sums, even though he had been one of its shareholders.

The absolute limit on any loans is a maximum of \$400.00. See Section 1757, Title 12, U. S. C. A., specifying powers of federal credit unions; and Section 1761(d) specifying limitation of loans.

The finding is discordant in that it purports to cloth appellant with a mantle of innocence by not knowing that Joseph Alden lacked authority to use the funds, yet at the same time, the legal limitations on the right of any officer, agent, or shareholder to use funds of Enesco Federal Credit Union would have to be known by appellant because knowledge of Joseph Alden's improper use of the moneys would be conclusively imputed to appellant.

In *Hays v. Bank of America*, 71 Cal. App. 2d 301, the court in stating the rule with respect to parties dealing with knowledge of the law, said at page 304:

“We must assume the parties to the contracts of employment knew of the existence of the Fair Labor Standards Act and took into consideration its provisions applicable to hours of work and compensation for overtime service.”

In referring to the imputed knowledge of the legislation relating to gold coin, the court in *Security-First Nat. Bk. v. De La Cuesta*, 15 Cal. App. 2d 302, said at page 304:

“All persons are conclusively presumed to have known these facts and to have been able to construe the notice of sale accordingly.”

See also:

Central Pacific Ry. Co. v. Droge, 171 Cal. 32 at 42;
Estate of Carroll, 138 Cal. App. 2d 363 at 365.

Even assuming that some representative of appellant did have knowledge that Joseph Alden was using the proceeds of these checks in connection with his personal business, that would not constitute a basis upon which appellee could escape liability under its bond. This is true for two reasons. The first is that neither the bond nor any of the riders thereto contain any provision which would exonerate the appellee merely because an officer or representative of appellant knew that the money was being paid to Joseph Alden for unlawful or improper purposes.

In fact, the primary purpose of the bond was to insure appellant against losses resulting from dishonesty of appellant's own employees. This type of loss is covered under the very first paragraph of the bond which insured

appellant against liability up to the extent of \$125,000.00 against any loss "through any dishonest act, wherever committed, of any of the employees, as defined in Section 6 hereof, whether acting alone or in collusion with others." Section 6 contains no provisions which would qualify the scope of this coverage. The rider which covered forgeries by persons other than employees limited appellee's liability to \$10,000.00. To emphasize the fact that it was not intended to diminish appellee's liability through losses of moneys through dishonest acts of employees, this rider contained the following provision:

"it being understood, however, that such liability shall be a part of and not in addition to the amount of the attached bond and that such limitation of amount shall not apply to any loss or losses in which dishonesty on the part of any of the Employees is involved;"

The dilemma facing appellee is that if appellee contends it has no liability under the forgery clause in the rider because of knowledge or collusion on the part of any employee of appellant, then instead of escaping liability, appellee would render itself liable to the full amount of appellant's loss of \$30,000.00, instead of to the limited amount of \$10,000.00 as specified under the forgery clause.

The second reason that knowledge on the part of any employee of appellant of Joseph Alden's wrongdoing would not exonerate appellee, is that the decisions hold to the contrary.

In *Massachusetts Bonding & Ins. Co. v. Hudspeth* (8th Cir.), 94 F. 2d 467, the court in affirming a judgment

against the bonding company, held that knowledge on the part of the president of the wrongdoing did not prevent the bank from recovering. In this connection the court said at page 471:

“It is further contended that the employer had knowledge of, and therefore consented to, the appropriation of these funds. This is based upon the assumption that Griffin must have received the money, and that Keith, the manager, knew the method employed by the bank and Mrs. Hord in paying Griffin’s checks. The knowledge of Griffin, however, could not be imputed to the corporation nor to the court, because he was a party to the fraud. *American Surety Co. v. Pauly*, 170 U. S. 133, 18 S. Ct. 552, 42 L. Ed. 977; *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 22 S. Ct. 833, 46 L. 1193. The bond contains provision that, ‘If the Employer be a corporation, the act or knowledge of any officer or director thereof, not in collusion with such defaulting Employee, shall be deemed the act or knowledge of the Employer within the meaning hereof.’ This contractual exception prevents Griffin’s guilty knowledge from being imputed to the corporation, and, even without it, it would not be charged with notice where he was acting for his own benefit, or was a party to the fraud. *Maryland Casualty Co. v. Tulsa Industrial Loan & Investment Co.*, 10 Cir., 83 F. 2d 14, 105 A. L. R. 529. The provision imputing to the corporation knowledge of an officer would not include such knowledge as Keith may have had.”

See also:

U. S. Fidelity & Guaranty Co. v. Walker (C. A. 5th), 248 Fed. 42 at 44;

American Surety Co. v. State, 76 Ind. App. 260, 127 N. E. 844 at 846;

Roosevelt Trust Co. v. American Surety Co. of N. Y., 91 N. J. L. 588, 103 Atl. 182 at 183;

Fiala v. Ainsworth, 63 Neb. 1, 88 N. W. 135 at 137;

Rankin v. Bush, 108 App. Div. 295, 95 N. Y. Supp. 718;

Nashville & American Trust Co. v. Aetna Cas. & Surety Co., 21 Tenn. App. 366, 110 S. W. 2d 1041;

Peurifoy v. Loyal, 154 S. C. 267, 151 S. E. 579 at 587; and

U. S. Fidelity & Guaranty Co. v. Bank of Thorsby (C. A. 5th), 40 F. 2d 950.

Conclusion.

A definition of forgery which turned upon whether the forger signed as a purported agent for a third party, or whether he merely signed the third party's name would be an artificial one. In both instances the result is the same, in that the forger obtains money to which he has no right to the damage of the party paying the money. The only difference is that in one instance the victim pays him the money because he mistakenly believes him to be the party whose name is forged, whereas, in the other instance the victim pays him the money because he erroneously believes that the forger has authority to sign the other party's name. The mistake is just as costly in either case, and it is generated by the false representations of the forger in each instance.

The legislative policy in making an unauthorized signing a forgery is not open to question in any event.

It has clearly expressed this policy in the statute, and the decisions of the California courts have uniformly recognized this as constituting the law ever since the amendment to the statute in 1905.

For these reasons we do not believe that the decision of the District Court should be permitted to stand.

Respectfully submitted,

JAMES A. McLAUGHLIN,

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APPENDIX.

The Following Is a Quotation of Section 470 of the Penal Code When It Was Adopted in 1872, and as It Existed When the Case of *People v. Bendit*, 111 Cal. 274, Was Decided.

“Every person who, with intent to defraud another, falsely makes, alters, forgoes, or counterfeits any charter, letters, patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any Controller’s warrant for the payment of money at the Treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge for any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificates of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts

to pass, as true and genuine, any of the above named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a Court, or the return of any officer to any process of any Court, is guilty of forgery."

No. 15627
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

JAMES A. McLAUGHLIN,
650 South Spring Street,
Los Angeles 14, California,
Attorney for Appellant.

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No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellee urges only two arguments in answer to this appeal.

One of these is that Alden could not commit a forgery because Enesco had authorized him to sign its checks. The other is that appellant knew the purpose for which the money was being obtained and, therefore, it was not defrauded by Alden. We will deal briefly with each of these arguments.

Alden Was Not Authorized to Sign Any Checks to Obtain Money for His Personal Use.

The findings support this statement, as follows:

“that said Joseph Alden used said currency to cash payroll checks for employees of National Supply

Company whose employees had formed the said Enesco Federal Credit Union; that the Enesco Federal Credit Union had not authorized the use of any of its funds to carry on the check-cashing operation hereinafter described.” [R. 32.]

The testimony of both William A. Hood, Enesco's President, and Gale W. Whitacre, its former President, clearly shows this to be the case. [R. 91-93, 95-98.]

The state court awarded judgment in favor of Enesco and against appellant on the ground that Enesco had no knowledge of Alden's peculations.

See:

Torrance National Bank v. Enesco Federal Credit Union, 134 Cal. App. 2d 360.

We are not concerned with whether Alden had authority to sign Enesco checks in connection with the business and activities of Enesco. There is no question but what he did have such authority, but it does not follow that he had authority to sign checks for his own personal gain.

Appellee seems to have no difficulty whatever in assuming that because he could sign checks for Enesco, he could also sign Enesco checks for himself. According to appellee's argument, an agent could not possibly commit a forgery. Appellee's concept of authority is that an authorization to sign checks in connection with the principal's business is also an authorization to sign the principal's checks for the agent's use.

Any such rule which would exempt an agent from forgery, even though the check which he signed was outside the scope of authority, would be unrealistic to say the

least. Suppose that the agent was authorized to sign a particular specified check for the principal, and that he, nevertheless, signed other checks for his own benefit? Under such a rule it would not be a forgery to do this. Obviously, the statute (P. C., Sec. 470) does not contemplate any such unrealistic distinctions. Neither does it grant immunity to an agent who oversteps his authority and signs checks for his own purposes.

Both the wording of the statute and the authorities in Appellant's Opening Brief put at rest any such contention. They clearly show that the signing of a purported principal's name under a claim of authority is a forgery wherever authority to sign the particular check does not exist, and the agent knows it to be non-existent. The matter does not turn upon any such technical and unrealistic distinctions as whether he signed as agent under the printed signature of the purported principal, or whether he signed the principal's name as though he were, in fact, the principal.

Appellant Neither Knew of, nor Consented to, the Forgery.

Appellee's second point is based upon the unfounded assertion that appellant knew that Alden was cashing the Enesco check to obtain money for use in Alden's check cashing business.

The trial court found that:

“the plaintiff bank knew the purpose for which the currency so secured by said Joseph Alden was being used, but did not know that the said Joseph Alden lacked authority to so use the funds;” [R. 33.]

This finding contains the implication that appellee knew that the check cashing business was the personal busi-

ness of Alden and not that of Enesco, but the evidence does not support such an inference. Mr. Alden testified that he had discussed the check cashing with both Mr. Post, the President of appellant, and Mr. Dinninger, the cashier. Mr. Post was deceased prior to the trial and Mr. Dinninger was paralyzed with a stroke [R. 101], so the only employee who testified was Mrs. Sandstrom, the teller who regularly handled these payments to Alden. Her testimony on the matter was as follows:

“Q. Did you know whether or not check-cashing activities were carried on over at the Enesco Federal Credit Union office? . . .

The Witness: Well, I presumed he was using it for cashing checks. I don't know what he had it for.

Q. (By Mr. McLaughlin): I mean, did you know whose business that was? A. I didn't.

Q. Did Mr. Alden ever state to you or in your presence anything about that being his own personal business, as distinguished from the Enesco Federal Credit Union's business? A. No, sir.

Q. Was Mr. Alden ever made a bonded messenger by the Torrance National Bank? A. No, sir.

Q. Was he ever employed by the Torrance National Bank in any capacity? A. No, sir.” [R. 102-103.]

Originally this check cashing activity had been an operation of Enesco which it permitted Alden to carry on in its premises and permitted him to retain the fees as part of his compensation. This activity was specifically authorized by the Directors of Enesco on September 30, 1948. [Pltf. Ex. 5 and R. 87.]

On August 17, 1950, the Directors of Enesco qualified this activity by permitting Alden to continue it, provided that he assumed all liability and expense in connection with it. [Pltf. Ex. 6, and R. 88-89.]

In March of 1953 the Directors of Enesco held another meeting at which the check cashing service was again dealt with. Mr. Hood describes this as follows:

“A. That evening we decided we would put an end to this check-cashing service. We were assured that night at the board meeting by Mr. Alden himself that the credit union was connected in no way, shape or form with it, and the money he obtained, he claimed he was a bank messenger and was working—

Q. Did he say he was a bonded messenger for the bank? A. Bonded messenger.

The Court: I think we should have this in the witness' words.

Q. (By Mr. McLaughlin): Tell us in substance the questions and the statements that you people made, and the questions and statements he made, Mr. Hood. A. Well, it was that the service that he was rendering was doing more harm to our credit union than what he was doing good, and so the board of directors felt at that time they should stop it.

He had been—had supplies bought ahead of time on some of his envelopes and letterheads, and so on and so forth, for his business that he had in there, and he asked if he could go for a period of time yet, until he used up those supplies which he had an inventory on.

At that time he was asked again about the funds, and he assured us that he was a bonded messenger from the bank.

Q. I would like to have you say who asked him, and more, in what words, how that came up as to what the funds he was using were, if you can. A. As I recall, I think it was Mr. Whitacre that asked him, the president at that time of the credit union.

Q. Can you tell us in substance how it was asked or what Mr. Whitacre said to him? A. All I can say is I know he was asked, I mean in a way that we were trying to put a stop to it. We didn't want it to go on any more.

And he assured us at that time that he had no—the credit union had no chance of trouble or anything from what he was doing because he was clear, that was his end of it and he was totally responsible for the check-cashing service that he was rendering.

Q. At that time, Mr. Hood, had it ever been brought to your attention that money was being obtained from the Torrance National Bank by checks signed by Mr. Alden, on which he would withdraw money and use it in his check-cashing activities? A. No.

Q. Did you know that was going on? A. No.”
[R. 91-92.]

Mr. Alden never wrote up the minutes of the above described meeting. [R. 89.]

Mr. Whitacre further describes the events of that meeting as follows:

“A. Mr. Alden was very upset. He practically begged us to let him continue his money order service, until his current supply which he had purchased—in other words, he had quite a bit of money involved in money orders was up; he asked us to let him continue. He assured the board of directors that the credit union funds in no way, shape or

form were involved in this check-cashing or other enterprises. He also assured us he was a bonded messenger from the Torrance National Bank and that he was currently negotiating, even then, for an armored car to make these money deliveries to the credit union office.

Q. Did you know at that time he had been using Enesco Federal Credit Union checks to get the money— A. No, I did not.

Q. Did you know he had a supply of unnumbered checks which he had printed up and was using for that purpose? A. Not at that time, sir.

Q. When did you learn that? A. Approximately sometime around April the 4th or 5th.

Q. Of 1953? A. Of 1953; after the robbery.

Q. That was after the robbery. A. After the robbery.” [R. 98.]

Although Alden’s testimony as to whether appellant knew that the check cashing operation was his personal business is somewhat vacillating, he finally admitted that whatever appellant’s officers knew about the matter was acquired in 1948 when Alden was actually carrying on the check cashing operation as a function of Enesco. His testimony in this connection is as follows:

“Q. (By Mr. McLaughlin): If you can, will you please tell us the time that you told either Mr. Post or Mr. Dinninger that you were getting these \$30,000.00 sums for use in your personal business of check-cashing? A. Well, that would be a hard question to answer because they knew that I was cashing checks on my own personal—as my own personal business from the time I inaugurated, which was in the fall or the winter of 1948 or the spring of 1949.

They knew my check-cashing activity was being conducted as my personal business at that time.

Q. And they knew at that time— A. That was only two or three thousand dollars at that time.

Q. They knew at that time that it was with the consent of the Enesco Federal Credit Union that you were carrying on that activity, didn't they? A. That is true.

Q. What I want to know is, when you told them after this discussion with Mr. Schultz, telling you that had to be disassociated, when did you tell Post or Dinninger that you no longer were carrying that on with the consent of the Enesco Credit Union? A. I never told them, because that situation never existed. It was Mr. Schultz that disapproved, not the board of directors of the Enesco Federal Credit Union.

Q. Did you ever come to either Mr. Post or Mr. Dinninger after you heard from Mr. Schulty and state, 'Now, I am carrying this on as my own independent activity and I am not getting any sponsorship or funds from the Enesco Federal Credit Union?' In substance, did you ever say anything like that to either of them? A. No, because that situation never existed.

Q. I just want to know whether you did or not. A. I didn't." [R. 75.]

"Q. That doesn't tell us anything. I am asking you to give the substance of the words you used in telling Mr. Post or Mr. Dinninger that this money was being used by you in your personal check-cashing activities, as distinguished from an activity of the Enesco Federal Credit Union? A. In the particular time you specify, I can't say I said it was my personal activity, because they knew it was my personal activity, in the beginning.

Mr. Shallenberger: I move to strike the part 'because they knew' as a conclusion and not responsive. The Court: Granted." [R. 80.]

It is clear from the above testimony that after Alden had been told by Enesco's Directors to discontinue the use of its funds in the check cashing operation, that he never advised appellant of this. Instead, he only made such changes as were necessary to conceal from Enesco the fact that he was continuing to use its money in his check cashing business. To this end he opened up an account under the name of Enesco Service Fund on a form of signature card indicating that Enesco Service Fund was an auxiliary account for Enesco Credit Union. The same form of "association" signature card was used by him in each instance. [Pltf. Exs. 1, 2 and 3; and R. 44-46.] Alden also started using the unnumbered checks so that Enesco's records would not disclose the checks which he used to obtain the moneys, and then he would pick up such check on the following day when he substituted the payroll checks, which he had cashed for the employees of National Supply Company, with the money withdrawn from appellant on the forged check.

In the light of this abundant evidence of wrongful intent of Alden, it is idle to state that he lacked a fraudulent intent. Of course, Section 470 of the Penal Code does not expressly require that there be a fraudulent intent. It does specify that the signing be without authority and that the signer know that he has no such authority. This knowledge is not only conclusively shown by the conduct of Alden in covering up his fraud, but also by the testimony of Hood and Whitacre as to Alden's concealments and misrepresentations to them.

In Appellant's Opening Brief we cited the authorities holding that even though one or more officers of appellant had been colluding with Alden in these forgeries, this would not exonerate appellee on its bond. In fact, we pointed out that if such collusion had actually existed, appellee would have been liable to appellant under another provision of its bonds for the entire \$30,000.00 loss which appellant suffered.

We do not believe that any intimations of bad faith or collusion on the part of either Mr. Post or Mr. Dininger are at all warranted by the record. They could not be present at the trial to defend against any such unfounded assertions, and if appellee now wishes to claim any such collusion on their part with Alden, then it should come forth and pay the whole \$30,000.00 under its bond.

Conclusion.

It is submitted that appellee has failed to show any lawful basis for escaping the liability which it assumed under the terms of its bond. When a financial institution buys this kind of protection from a surety company, the surety should not be permitted to escape liability on any such meaningless technicalities as have been urged in this case. The judgment should be reversed with directions to enter judgment for appellant.

Respectfully submitted,

JAMES A. McLAUGHLIN,

Attorney for Appellant.

No. 15627

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TORRANCE NATIONAL BANK, a national banking association,

Appellant,

vs.

THE AETNA CASUALTY & SURETY COMPANY, a corporation,

Appellee.

PETITION FOR REHEARING.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 15627

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TORRANCE NATIONAL BANK, a national banking association,

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Appellee.

PETITION FOR REHEARING.

To the Honorable Albert Lee Stephens, Chief Judge, the Honorable Dal M. Lemmon and the Honorable Stanley Nelson Barnes, Circuit Judges:

Appellant, above named, respectfully petitions this Court for a rehearing, after its decision on January 13, 1958, upon each of the following grounds:

1. The decision is predicated upon the premise that *People v. Bendit*, 111 Cal. 274, is still the law of California in spite of the subsequent amendment to the statute defining forgery. This conclusion is, in turn, based upon the erroneous assumption that the doctrine of *People v. Bendit*, *supra*, was reaffirmed as a matter of judicial decision in the case of *Pasadena Investment Co. v. Peerless Casualty Company*, 132 Cal. App. 2d 328. The state-

ment of the court in that case concerning *People v. Bendit* was pure dictum, because the court was not in that case concerned with the forgery by an agent.

2. The decision not only nullifies the express statutory definition of forgery, but it renders ineffective all forgery bonds carried by institutions to protect against loss arising out of forgeries by agents and employees of firms and concerns doing business with such institutions.

**People v. Bendit Has Not Been the Law of the State
of California Since the Amendment to Section 470
of the Penal Code in 1896.**

There is no question but what the statute (*Section 470* of the Penal Code) was materially changed by the legislature after the case of *People v. Bendit*. As the statute existed at the time *People v. Bendit* was decided, there was no reference to a signing without authority in the definition. (Appx. to App. Op. Br.)

Statutory law is entitled to an even higher dignity than law enunciated by court decisions. In *Burlingame v. Traeger*, 101 Cal. App. 365, the court states the rule at page 371:

“It must also be borne in mind that ‘our codes, of course, were intended as complete revisions of the existing laws upon the subjects embraced therein.’ (Estate of Carraghar, 181 Cal. 15 (183 Pac. 161, 163)), and that their provisions establish the law of this state respecting the subjects to which they relate. (*In re Apple*, 66 Cal. 432 (6 Pac. 7); *McLean v. Blue Point Gravel Min. Co.*, 51 Cal. 255.) It is only when the code and other statutes are silent that the common law governs.”

See also:

Monterey Club v. Superior Court, 48 Cal. App. 2d 131, at p. 145; and

Sharon v. Sharon, 75 Cal. 1, at p. 28.

On page 14 of Appellant's Opening Brief, we cited five California decisions which apply the rule that the signing without authority constitutes a forgery.*

The Court in the Case of Pasadena Investment Co. v. Peerless Casualty Company, 132 Cal. App. 2d 328, Did Not Even Have Before It a Document Which Was Signed or Which Purported to Have Been Signed by an Agent.

The quotation in the above case from *People v. Bendit* is nothing more than dictum. As was pointed out on page 22 of Appellant's Opening Brief, that case involved a sole proprietor doing business under a fictitious name who had written up fictitious invoices, and the question before the court was not whether this man was purporting to sign as agent for or in behalf of anyone else. The sole question was whether, in writing up fictitious invoices purporting to represent sales of merchandise, the proprietor had committed a forgery. The fact that the court in that case quoted language from *People v. Bendit*, part of which was pertinent and part of which was not, does not give dignity to the language in the quotation which was not necessary to the decision. In fact, it is clear that the court in *Pasadena Investment Co. v. Peerless Casualty Company*, *supra*, did not intend to formulate

**People v. Rushing*, 130 Cal. 449 at 451, *et seq.*; *Keikhoefer v. U. S. Nat. Bank*, 2 Cal. 2d 98 at 108; *People v. McKenna*, 11 Cal. 2d 327 at 332; *People v. Caldwell*, 55 Cal. App. 2d 238 at 245; and *People v. McPherson*, 6 Cal. App. 266 at 269.

a definition of forgery which was in any way contrary to *Section 470* of the Penal Code. This is evidenced by the fact that the court, after quoting from *People v. Bendit*, immediately quoted from *People v. McKenna*, 11 Cal. 2d 327, to the effect that a signing "without authority" with an intent to defraud was a forgery.

Even though the District Court of Appeal had intended to lay down the rule that signing the name of another without authority is not a forgery, it would have been only dictum and not law in any sense of the word at all. This rule is stated in 13 *Cal. Jur.* 2d, Courts, Section 143, at pages 674 to 676, as follows:

"The doctrine of *stare decisis* applies only to points that are involved and determined in a case in such a way as to be considered of compelling force as precedents in subsequent cases. A statement in a judicial opinion as to any other matter may be avoided or rejected in a subsequent case under the title of 'dictum', 'obiter dictum', 'mere dictum,' and the like, or it may nevertheless be adopted and followed, although the court by terming it dictum indicates that it does not feel compelled by *stare decisis* to follow it. Thus, 'dictum' described so many different types of statements of law that it can truthfully be said to describe nothing more precise than a judicial attitude or policy in the law of precedents, and frequently conceals more than it reveals.

"A statement of law may be labeled dictum for a variety of reasons. The traditional instance is where it is not regarded as germane or necessary to a determination of the issues before the court. Similarly, a legal proposition that is stated in broader terms than is called for by the facts to which it is applied has little value as precedent when invoked in a different factual situation."

The opinion in the case of *Pasadena Investment Co. v. Peerless Casualty Co.*, *supra*, is clear as to the precise issues involved. No briefs were written in that case involving the question which is before this court in the present case. Neither was any petition for hearing filed with the Supreme Court of the State of California involving any question such as the one involved in this case. For this reason, the case cannot be used to resuscitate the dead law in the decision of *People v. Bendit*, *supra*. The cases which state the presently applicable law have already been cited under our footnote herein and in Appellant's Opening Brief.

The Decision of This Court Is Also Contrary to Public Policy in That It Exonerates Surety Companies Who Have Sold Forgery Bonds and Have Collected Premiums on the Basis That These Bonds Afforded Protection Against Forgery as Defined by the Existing Statute and the Recent Decisions.

By a process of quoting too extensively from the case of *People v. Bendit*, a dictum arose which revitalized the doctrine of *People v. Bendit* and nullified the statute and the more recent decisions. The decision of this court, by following the dictum in the *Pasadena Investment Co. v. Peerless Casualty Co.* case, has transformed such dictum into law, with the result that institutions having bonds similar to the one involved in this action have no protection against forgery except in instances where the forger signs the name of another person and also falsely impersonates such other person. Both of these elements will be necessary if the decision of this court is to become the law. Aside from exonerating surety companies on liability for forgeries which have already occurred, the

decision of this court will require the rewriting of all forgery bonds in this state so as to embody language covering the signing as agent of another without authority. It cannot be assumed that holders of the present type of bonds will continue to pay premiums merely to obtain coverage in instances where the forger falsely impersonates the person whose name he has forged.

Modern business and financial institutions operate through officers and employees, and it is the unauthorized signing of documents by such officers and employees against which it is necessary to insure. The instances where an individual can come in and represent himself as being the party whose name he has forged are not only infrequent, but they involve small sums of money. They are usually small checks cashed in grocery and department stores. The substantial losses arise from forgeries committed by officers and employees, as in the case at bar, and these are the type of losses against which forgery bonds are purchased.

For each of the reasons above stated, it is respectfully submitted that a rehearing should be granted and that the decision of the District Court should be reversed.

Respectfully submitted,

JAMES A. McLAUGHLIN,

Attorney for Appellant.

Certificate of Counsel.

I, James A. McLaughlin, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

JAMES A. McLAUGHLIN,
Attorney for Petitioner.

No. 15628

United States
Court of Appeals
for the Ninth Circuit

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California.
Central Division.

FILED

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PAUL P. G. B. E. W. C. L.

No. 15628

United States
Court of Appeals
for the Ninth Circuit

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Central Division

No. 496-57 TC

SAM SNYDER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(Suit for Interest Included in Judgment)

Plaintiff brings this suit under the Judicial Code as amended, 28 U. S. C., Section 1346(a), for interest, pursuant to judgment, in the amount of \$3,249.19, plus interest thereon as allowed by law, and alleges as follows:

1. Plaintiff is an individual residing at Sherman Oaks, City of Los Angeles, California.

2. On March 29, 1955, there was entered in this court in favor of plaintiff and against Harry C. Westover, former Collector of Internal Revenue, in Docket 13521-Y, a judgment for refund of income taxes including, inter alia, individual income taxes (inclusive of interest paid thereon) in the sum of \$12,679.60 for the year 1943, \$6,372.67 for the year 1944, and \$2,838.03 for the year 1946, or a total of \$21,890.30, together with interest on said sums as

provided by law. A certificate of probable cause [2*] was included in said judgment.

3. On March 30, 1955, plaintiff filed with the Commissioner of Internal Revenue claims on form 843 for payment of said refunds, with "interest allowed by law," as ordered by said judgment.

4. Thereafter defendant issued a "notice of adjustment" in respect of the amounts so claimed, a photostatic copy of said notice being marked Exhibit "A" and attached hereto as a part of this complaint. Defendant, on or about December 16, 1955, refunded the sum of \$16,018.43, inclusive, of interest, as shown by said notice, but failed and refused, and still refuses, to pay the plaintiff any amount in excess of said sum.

5. In respect of taxes for the year 1943, the said judgment orders:

"Refund of individual income taxes (inclusive of interest paid thereon) in the sum of \$12,679.60, paid by plaintiff in respect to the year 1943, together with interest on said sum as provided by law as follows:

"On \$1,700 from May 6, 1948;

"On \$1,454.58 from August 9, 1948;

"On \$1,700.00 from September 9, 1948;

"On \$1,700.00 from October 8, 1948;

"On \$1,700.00 from November 6, 1948;

"On \$781.83 from December 6, 1948;

"On \$1,700.00 from January 13, 1949;

*Page numbering appearing at foot of page of original Certified Transcript of Record.

“On \$1,700.00 from February 14, 1949;

“On \$243.19 from March 14, 1949.”

As shown by page 2 of said notice of adjustment, however, defendant has refused to allow any interest on the first four of the above amounts or on \$864.56 out of the fifth of said amounts. In other words, defendant has refused to allow any interest on the first \$7,419.14 of the total of \$12,679.60 refundable for that year; yet [3] at the same time, as shown in the block at the bottom of page 1 of said notice, it has collected out of said judgment on the very same amount of \$7,419.14 interest in a total of \$4,161.21 from March 15, 1948, to December 6, 1955.

6. As also shown in the block at the bottom of page 1 of said notice, defendant has also collected out of said judgment the said sum of \$7,419.14 as the balance of an assessment for 1945.

7. Defendant has refused to pay interest on the portion of the overpayments so withheld to pay said assessment, but collected interest on the same amount as the assessment so paid.

8. Plaintiff on March 26, 1956, filed suit in this court against Robert A. Riddell, District Director of Internal Revenue, in Docket No. 20551-Y, for refund of \$10,715.10 out of said tax of \$7,419.14 and interest of \$4,161.21 for 1945 so collected out of said judgment. Said action is still pending, on notice of appeal.

9. Said taxes referred to in paragraph 2 above were collected by said Harry C. Westover, and said Harry C. Westover was not in office as collector of internal revenue when said action, Docket No. 13521-Y, was commenced, nor has said Harry C. Westover been in office since as collector or director of internal revenue. Nevertheless, a prior action in this court between the parties to this action, being Docket No. 20550-Y, in which plaintiff herein sued for the interest in the sum of \$3,249.19 claimed herein, and also for the said amount of \$10,715.10 as a balance due on said judgment, was dismissed on the motion of defendant herein for lack of jurisdiction on the ground that the action was not one for taxes alleged to have been overpaid, but rather a suit on a [4] judgment, and therefore within 28 U.S.C., Sec. 1346(a)(2), instead of Sec. 1346(a)(1) thereof.

Wherefore, plaintiff prays for judgment in his favor as follows: interest in the sum of \$3,249.19, plus interest on said sum as provided by Section 2411(b) of the Judicial Code, together with his costs and disbursements in this action, and such other relief as this court may deem meet and proper.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff. [5]

U. S. TREASURY DEPARTMENT
OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE
Los Angeles, California

7800-B ☐
7800-C ☐
7800-E ☐
7800 ☐

NOTICE OF ADJUSTMENT

MR Sam Snyder
c/o George T. Altman
233 South Beverly Drive
Beverly Hills, California

ALLOWED, \$ 21,890.30
SCHEDULE No. IT-B-2727

This Notice of Adjustment is issued in settlement of a judgment for the recovery of income taxes paid for the years 1943, 1944 and 1946, the judgment having been rendered against Harry C. Westover, Former Collector of Internal Revenue, in the District Court of the United States for the Southern District of California, Central Division.

Judgment:	Tax	Interest	Total
1943	\$ 9,922.72	\$2,748.88	\$12,671.60
1944	5,025.19	1,347.48	6,372.67
1946	<u>2,539.33</u>	<u>306.70</u>	<u>2,846.03</u>
Total	\$17,487.24	\$4,403.06	\$21,890.30

Interest (See page 2) \$ 5,708.48

Total payable under the judgment \$ 27,598.78

DISPOSITION OF OVERASSESSMENT OR OVERPAYMENT

This amount has been applied as a reduction of unpaid assessments in excess of the correct liability, for the year stated above, therefore is not refundable amount.

ABATED \rightarrow \$ _____ Overassessment

This amount is the refundable portion of the overassessment after giving effect to abatements and credits, if any. A check for this amount only is enclosed herewith.

REFUNDED \rightarrow \$ 10,309.95 Overpayment
\$ 5,708.48 Interest
\$ 16,018.43 Total refunded

This amount has been applied in payment of assessments which were unpaid, as shown below, therefore is not refunded.

CREDITED \rightarrow \$ 11,580.35 Overpayment
0 Interest
\$ 11,580.35 Total credited

WT AND ACCOUNT NO.	YEAR	AMOUNT CREDITED	DUE DATE**
15/42 221 \$14	1945	7,419.14	3-15-48
1042			
Acct. Int.		4,161.21	12-6-55

*The receipt by a taxpayer of refunds of taxes, the deduction of which in prior years resulted in tax benefits, should be treated as income for the taxable year in which such refund is received, except as otherwise provided by Federal statutes. The full amount of interest received and the interest, if any, allowed on the credit or refund of Federal taxes is taxable income and should be included in your income tax return or income for the taxable year in which received or applied as a credit to other taxes.

**If credited to original tax, show due date. If credited to additional tax, show assessment date.

hibit "A"

R. C. Kildall
District Director of Internal Revenue

Sam Snyder

Interest at 6% on:		Interest				
		From	To	\$	None	
1943	\$1,700.00	5- 6-48	3-15-48		"	
	1,454.58	3- 9-48	3-15-48		"	
	1,700.00	9- 9-48	3-15-48		"	
	1,700.00	10- 8-48	3-15-48		"	
	1,700.00 864.56	11- 6-48	12-6-55	355.06		
	781.83	12- 6-48	12-6-55	328.37		
	1,700.00	1-13-49	12-6-55	703.43		
	1,700.00 843.94	2-14-49	12-6-55	344.84		
	235.19	3-16-49	11-8-55	345.93		
				93.79		\$2,171.42
1944	619.79	5-17-49	11-8-55	240.86		
	1,700.00	6-15-49	11-8-55	652.71		
	1,700.00	7-15-49	11-8-55	644.21		
	1,700.00	8-15-49	11-8-55	635.71		
	652.88	9-15-49	11-8-55	240.87		2,414.36
1946	727.43	3-14-49	11-8-55	290.32		
	1,700.00	4-15-49	11-8-55	669.71		
	418.60	5-17-49	11-8-55	162.67		1,122.70
			Total	\$		5,708.48

Endorsed : Filed April 23, 1957.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and in answer to the allegations of plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs 1 through 9 of the complaint.

Wherefore, defendant having fully answered plaintiff's complaint, prays that he take nothing in this suit; that plaintiff's complaint be dismissed; and that defendant be allowed its costs herein.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States At-
torney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1957. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT

To Plaintiff, Sam Snyder, and to George T. Altman,
His Attorney:

You, and Each of You, Will Please Take Notice that on Monday, May 20, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard in Courtroom No. 7 before the Hon. Leon R. Yankwich, Chief Judge, in the Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, defendant, United States of America, by and through its attorneys herein mentioned, will make the following motion for summary judgment:

The defendant, United States of America, moves the Court to enter summary judgment against the plaintiff and for the defendant, dismissing the complaint with prejudice on the ground that there is no genuine issue as to any material fact in this action, and that the defendant is entitled to judgment dismissing the complaint with prejudice as a matter of law as appears from the pleadings, exhibits, briefs and the affidavit of Edward P. Weathersbee, attached hereto and made a part hereof. [10]

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States At-
torney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

Local Rule 3(d)(2) waived. May 9th, 1957.

/s/ LEON R. YANKWICH,
Judge.

[Title of District Court and Cause.]

AFFIDAVIT OF
EDWARD P. WEATHERSBEE

United States of America,
Southern District of California—ss.

Edward P. Weathersbee, being duly sworn, deposes and says:

That he is Chief of the Special Procedures Section of the Office of the District Director of Internal Revenue at Los Angeles, California;

That the records of the Internal Revenue Service disclose that on March 15, 1948, an assessment was made against Sam Snyder for the year 1945 in the sum of \$11,803.51 income tax, plus \$1,363.22 interest, to February 18, 1948; and that on March 23, 1948, Sam Snyder was served with a notice and demand to pay said assessment, but did not do so within ten days thereafter;

That on December 6, 1955, \$11,580.35 was credited

against said assessment and the delinquent interest accrued thereon;

Further affiant sayeth not.

/s/ EDWARD P. WEATHERSBEE,
Affiant. [15]

Subscribed and Sworn to before me this 9th day of May, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk, United States District Court, Southern District of California;

By /s/ M. E. THOMPSON,
Deputy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1957. [16]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO FINDINGS
OF FACT, CONCLUSIONS OF LAW, AND
SUMMARY JUDGMENT LODGED BY DE-
FENDANT

Plaintiff objects to the Findings of Fact, Conclusions of Law, and Summary Judgment lodged by defendant for the following reasons:

1. The answer admits all of the allegations in the complaint, and it contains no affirmative allegations. Except for the allegations in the complaint, therefore, and the affidavit attached to defendant's motion for summary judgment, there is nothing whatever upon which a finding of fact can be based. The Findings of Fact as prepared by de-

fendant, however, distort, by serious omission and by alteration of wording, the facts as shown by the complaint, the answer, and the said affidavit.

2. Local Rule 3(d)(2) requires that proposed findings of fact be served and filed with a motion for summary judgment. Defendant failed to file any such proposed findings. Plaintiff assumed therefore that defendant was proposing as findings the [18] facts as alleged and admitted in the pleadings, together with the affidavit which it submitted. But now defendant produces an entirely different set of findings. Except for the fact that Local Rule 3(d)(2) was waived by the Court there would be a clear violation of that rule. It is doubtful that the Court intended by such waiver to allow defendant to submit findings which varied substantially from the facts as shown by the record.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1957. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT

The above-entitled matter having come on for hearing on the defendant's motion for summary judgment before the Honorable Leon R. Yankwich, Chief Judge, the plaintiff represented by his attorney, George Altman, and the defendant by its attorneys, Laughlin E. Waters, United States At-

torney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, by Robert H. Wyshak, Assistant United States Attorney, the plaintiff in open court having stricken the last sentence of paragraph 8 of the complaint by leave of court, and the Court having considered the affidavit, exhibits, arguments of counsel, and authorities submitted, makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

On or before March 15, 1946, plaintiff filed his individual federal income tax return for the year 1945 with the Collector of [21] Internal Revenue for the Sixth District of California and paid the taxes shown thereon to be due in the sum of \$4,300.69.

II.

On March 15, 1948, there was assessed against the plaintiff a deficiency in income tax for the year 1945 in the sum of \$11,803.51 plus interest in the sum of \$1,363.22 computed to February 18, 1948. On March 23, 1948, the plaintiff was served with a Form 17, Notice & Demand to pay said assessment, but did not do so within ten days.

III.

On March 29, 1955, there was entered in this Court in favor of the plaintiff and against Harry C. Westover, a former Collector of Internal Revenue, in Docket No. 13521-Y, a judgment decreeing an

overpayment of income taxes for the years 1943, 1944 and 1946 together with interest as provided by law. A Certificate of Probable Cause was included in said judgment.

IV.

With respect to the year 1943 the judgment set forth the following overpayments with the dates of payment as follows:

- \$1,700.00—May 6, 1948.
- \$1,454.58—August 9, 1948.
- \$1,700.00—September 9, 1948.
- \$1,700.00—October 8, 1948.
- \$1,700.00—November 6, 1948.
- \$ 781.83—December 6, 1948.
- \$1,700.00—January 13, 1949.
- \$1,700.00—February 14, 1949.
- \$ 243.19—March 14, 1949.

V.

On March 30, 1955, plaintiff filed with the Commissioner of Internal Revenue a judgment claim for refund based on said judgment. [22]

VI.

Thereupon, the Commissioner issued a Notice of Adjustment, Form 1331-B, advising the plaintiff that a portion of the adjudged overpayment of taxes had been credited to the unpaid balance of the outstanding assessment for the year 1945. The remaining overpayments together with interest to November 8, 1955, a date preceding the date of the refund check by not more than thirty days were refunded to the plaintiff.

VII.

On December 6, 1955, the District Director of Internal Revenue signed the schedule containing the overassessment whereby there was credited out of the overpayments for the year 1943, \$7,419.14 toward the balance of unpaid assessed tax for 1945, and \$4,161.21 toward interest accruing thereon from the date of the assessment, March 15, 1948, to December 6, 1955.

VIII.

Since the date of the assessment, March 15, 1948, of the 1945 tax liability preceded the dates of the payments made on the tax liability for the year 1943 as set forth in paragraph IV hereinabove, no interest was allowed on the overpayments credited to the assessed tax. Interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment under §294(b) of the 1939 Int. Rev. Code, from the dates of payment to December 6, 1955.

IX.

Every conclusion of law deemed to be a finding of fact is hereby found as a fact and incorporated herein.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and the parties hereto. [23]

II.

Under §6402 of the 1954 Int. Rev. Code, the District Director properly credited the adjudged over-

payments for the year 1943 to the outstanding tax liability for 1945. *Cole vs. Helvering*, 73 F.2d 852 (D.C. Cir. 1934).

III.

Under §3771(b)(1) of the 1939 Int. Rev. Code, no interest was allowable on the overpayments for the year 1943 credited to the 1945 assessment made on March 15, 1948, since the dates of payment preceded the date of the assessment. Section 2411(a) of Title 28, U.S.C., provides for interest only in the event of a refund.

IV.

Delinquency interest properly accrued on the outstanding assessment for 1945, under §294(b) of the 1939 Int. Rev. Code, from the date of assessment to the date of the credit, December 6, 1955. Rev. Rul. 55-485, 55-2 Cum. Bull. 499, as modified by Rev. Rul. 56-573, 56-2 Cum. Bull.—

V.

The defendant is entitled to judgment dismissing the complaint with prejudice, together with its costs in the sum of \$20.00 taxed 6-6-57.

VI.

Every finding of fact deemed to be a conclusion of law is hereby concluded as a matter of law and incorporated herein.

Summary Judgment

In accordance with the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the complaint be dismissed with prejudice, that the plaintiff take nothing, and that the defendant have its costs in the sum of \$20, taxed 6-6-57, to be taxed by the Clerk of the Court.

Dated: May 28, 1957.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of service by mail attached.

Lodged May 23, 1957.

[Endorsed]: Filed May 28, 1957.

Docketed and entered May 28, 1957. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff Sam Snyder hereby appeals to the Court of Appeals for the Ninth Circuit from the order in the above-entitled case granting defendant's motion for summary judgment, which order was entered on May 28, 1957.

Dated this 11th day of June, 1957.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 12, 1957. [26]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS ON
WHICH PLAINTIFF INTENDS TO RELY

1. This action being a suit for interest based upon a judgment covering the years 1943, 1944, and 1946, it is governed by Sec. 3773 of I.R.C. 1939, and Section 2411(a) of the Judicial Code (formerly sec. 177(b)).

2. Section 3771 of I.R.C. 1939 applies only to overpayments determined by the Commissioner, and not to overpayments ordered refunded by judgment.

3. It was not the intent of Congress to charge a taxpayer with interest on an assessment for a period of 7 years, but to deny him any interest for the same period on an overpayment offset against the assessment.

4. The assessment being paid out of the judgment, whether by credit of the judgment against the assessment or distraint for the assessment against the judgment, the result is constructively the same as the payment of the judgment by [28] check and attachment of the check in payment of the assessment.

5. The findings of fact do not conform to the pleadings and affidavits filed.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 14, 1957. [29]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 33, inclusive, containing the original

Complaint;

Answer;

Motion and Notice of Motion for Summary Judgment and Supporting Brief and Affidavit;

Plaintiff's Objections to Findings of Fact, Conclusions of Law, and Summary Judgment Lodged by Defendant;

Findings of Fact, Conclusions of Law and Summary Judgment;

Notice of Appeal;

Amended Statement of Points on Which Plaintiff Intends to rely;

Amended Designation of Contents of Record on Appeal;

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 16th day of July, 1957.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15628. United States Court of Appeals for the Ninth Circuit. Sam Snyder, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 17, 1957.

Docketed: July 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

GEORGE T. ALTMAN,

233 South Beverly Drive,

Beverly Hills, California,

Attorney for Appellant.

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No. 15628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdiction.

This appeal involves interest on a judgment for refund of taxes to the extent relating to income taxes for the calendar year 1943.

Appellant is an individual residing in Los Angeles, California. [R. 3, 9.] The income tax return involved was filed by him with the Collector of Internal Revenue for the Sixth District of California. [R. 13.]

On March 29, 1955, after remand by this court, 217 F. 2d 928, judgment was entered in appellant's favor for refund of a deficiency, together with interest thereon as provided by law. [R. 13.] On March 30, 1955, appellant filed with the Commissioner of Internal Revenue claim on form 843 for payment of said judgment. [R. 14.]

On December 6, 1955, a refund check was issued to appellant. [R. 7.] Interest was included in the amount of said check except that no interest was included on the first \$7,419.14 of the refund ordered for 1943. [R. 8.]

On April 23, 1957, appellant filed suit for the said interest in the court below. [R. 8.] Jurisdiction was conferred on that court by 28 U. S. C., section 1346-(a)(2). On May 28, 1957, summary judgment was entered dismissing the complaint with prejudice and with costs for defendant. [R. 17.] Within sixty days thereafter and on June 12, 1957, appellant filed notice of appeal pursuant to 28 U. S. C., section 2107 and F. R. C. P., Rule 73(a). [R. 17.] Jurisdiction is conferred on this court by 28 U. S. C., section 1291.

Questions Presented.

1. Whether interest may be denied on an overpayment of tax ordered refunded by judgment, where there is collected out of the judgment an assessment for a prior year plus interest thereon up to the date of such collection.

2. Whether summary judgment is proper where the findings of fact do not cover material issues of fact contained in the pleadings and affidavits filed.

Statutes, Rules, and Regulations Involved.

The statutes, rules, and regulations involved in this proceeding are set forth in the Appendix, *infra*.

Statement.

This proceeding, involving interest on a judgment for refund of federal income taxes, is, like No. 15554 in this court, a sequel to *Snyder v. Westover*, No. 13643 in this court, decided December 20, 1954, and reported at 217 F. 2d 928.

The years involved there were 1943, 1944, 1945, and 1946, the amounts involved had been paid as deficiencies, and the question was whether a specified share of the income of a partnership, California Car Company, was the income of appellant's daughter, who reported it on her return, or the income of appellant.

The deficiencies had been assessed on March 23, 1948. Appellant paid the assessments in installments. In that manner he paid the assessments in full except for a balance of \$7,419.14 which remained for the year 1945. He failed to pay that balance only because his funds were exhausted by the payments which he did make. [See R. 30 in No. 15554.] After claim for refund, suit, judgment, appeal to this court, remand, and amendment of judgment pursuant to remand, a judgment which became final was entered, on March 29, 1955. As to the year 1943 the said judgment ordered:

“Refund of individual income taxes (inclusive of interest paid thereon) in the sum of \$12,679.60, paid by plaintiff in respect to the year 1943, together with interest on said sum as provided by law as follows:

- On \$1,700.00 from May 6, 1948;
- On \$1,454.58 from August 9, 1948;
- On \$1,700.00 from September 9, 1948;
- On \$1,700.00 from October 8, 1948;
- On \$1,700.00 from November 6, 1948;
- On \$781.83 from December 6, 1948;
- On \$1,700.00 from January 13, 1949;
- On \$1,700.00 from February 14, 1949;
- On \$243.19 from March 14, 1949.” [R. 4, 9.]

The above amounts and dates correspond to the deficiency paid for 1943, in the installments paid and the

dates of their payment. Out of the refund so ordered appellee collected the said unpaid balance of \$7,419.14 on the assessment for 1945, and also interest in the amount of \$4,161.21 on that assessment from the date of the assessment, March 23, 1948, ^{to Dec. 6, 1955.} [R. 5, 9.] Appellee on December 6, 1955, issued a check to appellant for the balance of the refund ordered but refused to include in the check any interest on the first \$7,419.14 of the amounts ordered refunded for 1943. [R. 5, 9.]

Appellee's reason was that, to the extent of \$7,419.14, the amounts ordered refunded for 1943 were not actually refunded but were applied in payment of the unpaid balance of the assessment for 1945 and that, therefore, pursuant to section 3771(b)(1) of I. R. C. 1939, the said amounts, to the extent of \$7,419.14, bore no interest after March 23, 1948, the date of the 1945 assessment. [R. 16.] In other words, appellee refused to allow any interest on the first \$7,419.14 of the amounts for 1943 ordered refunded by the judgment; yet at the same time it collected out of said judgment on the very same amount of \$7,419.14, as the unpaid balance of the assessment for 1945, interest in a total of \$4,161.21 from March 15, 1948, to December 6, 1955. [R. 5, 9.]

This suit followed. Appellee in its answer admitted all of the allegations in the complaint. [R. 9.] It then filed a motion for summary judgment, supported by an affidavit. [R. 10.] The court granted the motion and appellee lodged proposed findings of fact, conclusions of law and judgment. Appellant filed objections on the ground that the findings proposed did not conform to the pleadings and affidavit filed. [R. 12.] The court nevertheless signed the findings of fact and conclusions of law as lodged and entered the judgment. [R. 12a-17.] This appeal followed.

Specifications of Error.

The court below erred as follows:

1. In denying to appellant interest as determined under the Judicial Code, on the refund ordered by judgment to the extent of an assessment collected therefrom.
2. In entering summary judgment denying such interest upon the basis of findings which do not cover material issues of fact contained in the pleadings and affidavits filed.

Summary of Argument.

I. R. C. 1939, section 3771, relating to interest in the case of overpayments of tax, distinguishes, in respect to the period for which interest is to be allowed, between overpayments credited against assessments and overpayments refunded. In the case of overpayments credited, interest is allowed, section 3771(b)(1), only up to the date of the assessment against which the credit is made.

Applying that section here the Commissioner refused interest on an overpayment for a period of more than seven years but collected out of that same overpayment not only the assessment but interest on the assessment for the same period.

Section 3771, however, applies only to overpayments determined by the Commissioner and not to those denied by the Commissioner but determined by a court. In the latter case, the Internal Revenue Code itself, I. R. C. 1939, section 3773, expressly requires that the interest be determined under the provisions of the Judicial Code. Under those provisions interest must be allowed up to the date of the refund check.

The power of the government to collect an unpaid assessment out of a judgment for refund is not involved here. Such collection may be made in any case under the distraint provision of the Internal Revenue Code, I. R. C. 1954, section 6331. It may also be made under the offset provision of the statute relating to debts due by or to the United States, 31 U. S. C., sec. 127. Under such provisions the mechanics of refund would be the same except that the refund check would be issued by the Treasury Department to the division of government to which the debt is due instead of to the taxpayer.

Application of the provision of the Internal Revenue Code relating to credit of overpayments would also be a collateral attack upon the judgment here which does not order a credit but instead expressly orders a refund.

The summary judgment here is also improper because the findings upon which it is based omit a material fact and otherwise distort the facts as shown in the pleadings and affidavits.

ARGUMENT.

I.

Under the Express Terms of the Revenue Statute, I. R. C. 1939, Section 3773, Interest Here Must Be Computed Under the Provisions of the Judicial Code, and Under Those Provisions It Is Mandatory That Interest Be Allowed in the Case of a Judgment for Refund.

Sections 3770 to 3773 of the Internal Revenue Code of 1939 are entitled as follows:

Sec. 3770. Authority to make abatements, credits and refunds.

Sec. 3771. Interest on overpayments.

Sec. 3772. Suits for refund.

Sec. 3773. Interest on judgments.

Of section 3771, subsection (b), covering the interest period, treats credits and refunds separately. Under subsection (b)(1), in the case of a credit against an assessment interest is allowed on the amount so credited to the date of the assessment. Under subsection (b)(2), in the case of a refund interest is allowed to a date preceding the date of the refund check by not more than 30 days.

In section 3773, the term "Interest on Judgments" means interest, not on the judgment itself, but on the overpayments included in the judgment. (*Mellon v. United States, ex. rel. Orono Pulp & Paper Co.* (App. D. C.), 50 F. 2d 1007, 1007-1008.)

Of the above sections, section 3770 authorizes *the Commissioner* to make refunds. Section 3773, which, as shown above, follows the section relating to *suits* for refund, provides as follows:

“For interest on judgments, see section 177 of the Judicial Code as amended by act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877 (U. S. C., Title 28, sec. 284).”

Of section 177 of the Judicial Code there referred to, subsection (a) relates only to the Court of Claims, and subsection (b), relating generally to internal revenue taxes, is now *verbatim* section 2411(a) of the Judicial Code. (H. R. 352, U. S. C. Congressional Service 1949, Vol. 2, at p. 1273.) Indeed, in section 6612(a) of the Internal Revenue Code of 1954, which continues section 3773 of the Internal Revenue Code of 1939, “177” is simply replaced by “2411(a).”

Thus the Internal Revenue Code itself makes applicable in the case of judgments, section 2411(a) of the Judicial Code. Pursuant to that section, in the case of a judgment for a refund, interest is mandatory. That section requires that, “In any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days.”

To the same effect, Sol. Op. 143, I-2 C. B. 261, an Internal Revenue ruling, where it is stated, at page 266:

“Where suit is instituted against a collector of internal revenue for the recovery of taxes alleged

to have been erroneously or illegally collected, interest may be allowed by the court *in* the judgment, and when so allowed must be refunded with the tax.” (*Italics in original.*)

Likewise, in *Mellon, et al. v. United States, ex rel. Hiss* (App. D. C.), 36 F. 2d 609, it was held that for determination of interest in case of a suit for refund of internal revenue taxes section 177(b) of the Judicial Code was exclusive.

It follows that in this case, under the express terms of the statute, interest must be determined under section 2411(a) of the Judicial Code and cannot be determined under any other provision of law.

II.

Section 3771 of I. R. C. 1939, of Which Subsection (b)(1) Provides the Interest Period in the Case of Credit of Overpayments, Applies Only to an Overpayment Determined by the Commissioner and Not to One Determined by a Court.

It may be observed first, in regard to section 3771 of I. R. C. 1939, that the preceding section, section 3770, authorizes *the Commissioner* to make refunds of overpayments. Consistently, it has been expressly held that the term “overpayment” as used in section 3771 means only an overpayment *determined by the Commissioner*.

In *Bonwit Teller & Co. v. United States* (Ct. Cls.), 52 F. 2d 904, after remand by the Supreme Court in 283 U. S. 258, 51 S. Ct. 395, there was involved section 1116 of the Revenue Act of 1926, which, with amendment not here pertinent by the Revenue Act of 1928, became section 3771 in I. R. C. 1939. The court there

refused to apply section 1116 of the Revenue Act of 1926, but applied section 177(b) of the Judicial Code, expressly because the refund was allowed, not by the Commissioner, but by the court. The court there, rejecting the contention that section 1116 of the Revenue Act of 1926 was applicable, stated, at pages 905-906:

“If this were a suit only for interest on a tax which the Commissioner had refunded, this contention would be correct. But here the Commissioner refused to refund the tax which had been erroneously and illegally collected, and also refused to pay any interest thereon.”

Again, in *Standard Oil Co. v. United States* (Ct. Cls.), 5 F. Supp. 976, it was held that that section of the revenue act, insofar as it related to credit of an overpayment against a deficiency, applied only to “cases where both deficiencies and overpayments have been found by the *Commissioner*, and the final determination of the overpayment or deficiency as the case might be was only a matter of a *few weeks* at most.” (Italics added.)

Likewise, in *Pan American World Airways, Inc. v. United States*, 119 F. Supp. 144 (S. D., N. Y., 1953), it was held that the statutory sections express “a carefully integrated program providing for interest, fully protecting both the government and the taxpayer,” and permitting “the taxpayer to settle his tax liability and the government to get its money without delay *where no controversy remains between the taxpayer and the Commissioner.*” (Italics added.)

This difference in treatment of interest as between overpayments allowed by the Commissioner, on the one hand, and judgments, on the other hand, is emphasized

by their completely separate treatment in every enactment of revenue law. Thus in the Revenue Act of 1926, section 1116 covered "Interest on Refunds and Credits," while section 1117, entitled "Interest on Judgments," amended the Judicial Code in respect to interest included in judgments. In the Revenue Act of 1928 the corresponding sections are 614 and 615. In I. R. C. 1939, which followed, the corresponding sections are 3771 and 3773; and in I. R. C. 1954, they are sections 6611 and 6612(a). Throughout the entire history of the federal revenue law interest in the case of judgments has been treated entirely separately from interest in the case of overpayments allowed by the Commissioner.

It is clear from that history and the cases cited that section 3771 has no application to a *judgment*, where the determination is made by a court and not by the Commissioner. In that case the interest must be determined under the Judicial Code, as required by section 3773.

III.

It Was Not the Intent of Congress to Charge a Taxpayer With Interest on an Assessment for a Period of Seven Years but to Deny Him Any Interest for the Same Period on an Overpayment for a Prior Year Offset Against the Assessment.

The reason for the separate treatment of interest in the case of judgments is especially clear here, where the judgment was entered, not a few weeks after the assessment collected out of it, but more than *seven years* thereafter. If section 3771(b)(1) is applied here, as appellee has done, interest is collected on the 1945 assessment for the entire seven-and-a-half year period from March 23, 1948, to December 6, 1955, but no interest is allowed for

the same period on the overpayment for 1943 out of which that very assessment is collected.

The principle involved in the credit of an overpayment determined by the Commissioner is clearly carried through to appellant's position in *The New River Company v. United States* (Ct. Cls.), 30 F. Supp. 239, as follows:

“The gist of our decision in *Standard Oil Company v. U. S.*, 78 Ct. Cls. 714, was that the intent of Congress in the enactment of the applicable sections of the Revenue Act of 1926 ‘was to require a mutual set-off of overpayments and deficiencies and to prevent the allowance of interest to the taxpayer for a period during which he was indebted to the Government.’ The inference from that decision, of course, is that it was not intended, on the other hand, to allow the Government interest when it was indebted to the taxpayer.”

Here, however, appellee has collected interest, in the sum of \$4,161.21, for a period of more than *seven years* during which it was indebted to appellant, and on that same indebtedness it now attempts to avoid interest altogether.

This clear injustice is even more emphasized by the fact that appellant did not deliberately omit payment of that balance of the assessment for 1945. Appellant's funds were exhausted by the installments which he did pay for other years, which installments, although overpayments, were not refunded until December 6, 1955, after remand by this court.

Thus the attempt here to apply section 3771 to a judgment results in an injustice of the most palpable character, and clearly one which the Congress did not intend.

IV.

The Attempt to Apply Section 3771(b)(1) of I. R. C. 1939 Here Is a Collateral Attack Upon the Judgment.

In order to make the question clear, appellant is not contending that the government cannot collect an assessment out of a judgment for refund. To call the procedure used that of "credit" of the judgment against the assessment is wholly academic. A judgment ordering payment of money is property (*United States ex rel. Marcus v. Lloyd Electric Company* (D. C., Pa.), 43 F. Supp. 12; *Mills Organization v. Shawmut Corp.*, 29 Cal. 2d 863; *Pennsylvania Company v. Scott*, 346 Pa. 13, 29 A. 2d 328, 144 A. L. R. 849) so that the government can collect an assessment out of it under the revenue provision for distraint. (I. R. C. 1954, sec. 6331; Treas. Regs., sec. 301.6331-1; Rev. Rul. 89, 1953-1 C. B. 474.)

Since taxes due the United States are debts (*Price v. U. S.*, 269 U. S. 492) the government can also collect a deficiency out of a judgment under the general provision for offset of any debt due the United States against judgments against the United States. (Act of March 3, 1875, now 31 U. S. C., sec. 227; *Aluminum Co. of America v. U. S.* (Ct. Cls., 1940), 30 F. Supp. 686.) In respect to that provision the Supreme Court, in *United States v. Jones*, 119 U. S. 477, 7 S. Ct. 283, stated, at 7 S. Ct. 285:

"Reference is also made to an act of March 3, 1875, c. 149 (18 St. 481), which provides for 'deducting any debt due the United States from any judgment recovered against the United States by such debtor'; but this gives the accounting officers of the government no authority to re-examine the judgment.

It only provides a way of payment and satisfaction if the creditor shall, at the time of the presentation of his judgment, be a debtor of the United States for anything except what is included in the judgment, which is conclusive as to everything it embraces.”

In the *Aluminum Co.* case the Court of Claims, referring to the Act of March 3, 1875, and section 177(b) of the Judicial Code, now section 2411(a) thereof, allowed the procedure under the Act of March 3, 1875, but computed the interest under the said section 177(b). The Court there stated:

“The two Acts are not in conflict and wherever applicable must be construed as having concurrent effect.”

Nor would the mechanics be any different in the case of offset than in case of a refund actually paid to the taxpayer, except that the check issued by the Treasury Department for the refund would be made, not to the taxpayer, but to the proper division of government, here to the District Director of Internal Revenue. (*Cherry Cotton Mills, Inc. v. United States* (Ct. Cls.), 59 F. Supp. 122, aff'd 327 U. S. 536, 66 S. Ct. 729.)

What is involved here, then, is not the right of the government to collect the assessment out of the judgment. What is involved here is only the determination of interest and the question is whether section 3771(b)(1) of I. R. C. 1939 may be applied in that determination.

That provision applies by its express terms only to a credit. A provision immediately following covers re-

funds. The judgment here, however, says nothing about a credit. On the contrary, it provides expressly for a refund; and a judgment, as stated in *United States v. Jones, supra*, is "conclusive as to everything it embraces." Yet defendant is trying to treat it as if it did not order a refund but did instead order a credit. Such treatment would be a collateral attack upon the judgment. In *Cocke v. Halsey et al.*, 41 U. S. 71, 87, 10 L. Ed. 891, the Supreme Court stated:

" . . . in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this court, as in the cases of *Thompson v. Tolmie et al.* (2 Peters, 157), *The United States v. Arrendondo* (6 Peters, 720), *Voorhees v. The Bank of the United States* (10 Peters, 473), and *The Philadelphia and Trenton Railroad Company v. Stimpson* (14 Peters, 458)."

Appellant has no complaint here because the government collected an assessment out of the judgment for refund, as it might by distraint or offset. To treat such collection as a credit, however, instead of the refund expressly ordered, so as indirectly to apply a provision for the computation of interest which was never intended for a situation such as this is clearly a collateral attack upon the judgment which established law prohibits.

V.

No Summary Judgment Could Be Entered Here in Favor of Appellee Because the Findings Do Not Conform to the Pleadings and Affidavits Filed and as the Findings Are Framed a Material Issue of Fact Remains.

The allegations in the complaint were all admitted by the answer. The answer alleges no additional facts. The only addition to the facts is appellee's affidavit. Thus there is nothing upon which findings here can be based except the allegations in the complaint and appellee's affidavit.

The findings, however, omit the very material fact that the judgment expressly ordered a *refund*. The findings, in addition, distort the facts shown in the pleadings and the affidavit.

It follows that the summary judgment entered here was improper in any case. (*Sarkes Tarzian, Inc. v. United States* (C. A. 7, Feb. 1957), 240 F. 2d 467; *United States v. Gardner* (C. A. 9, May 1957), 244 F. 2d 952.

Conclusion.

Appellant submits in conclusion that the summary judgment entered was erroneous and that the court below should not have denied to appellant interest as expressly provided under the Judicial Code.

GEORGE T. ALTMAN,

Attorney for Appellant.



APPENDIX.

I. R. C. 1939, section 3771(b)—INTEREST ON OVERPAYMENTS.

(b) PERIOD.—Such interest shall be allowed and paid as follows:

(1) CREDITS.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) REFUNDS.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

I. R. C. 1939, section 3773—INTEREST ON JUDGMENTS.

For interest on judgments, see section 177 of the Judicial Code as amended by act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877 (U. S. C., Title 28, sec. 284).

I. R. C. 1954, section 6612(a)—CROSS REFERENCES.

(a) Interest on Judgments for Overpayments.—
For interest on judgments for overpayments, see 28 U. S. C. 2411(a).

JUDICIAL CODE, section 177, as amended by Act of May 29, 1928, c. 852, sec. 615, 45 Stat. 877.

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

JUDICIAL CODE, section 2411(a), as amended May 24, 1949, c. 139, sec. 119, 63 Stat. 105.

In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal

Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

No. 15628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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No. 15628
IN THE
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FOR THE NINTH CIRCUIT

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The findings of fact and conclusions of law of the
District Court [R. 12a-16] are not officially reported.

Jurisdiction.

This is a suit seeking interest on overpayments for 1943
which were credited to an unpaid assessment for 1945.
[R. 3, 14-15.] A part of the tax for 1943 was paid in
installments in 1948 and 1949. [R. 14.] These amounts
were declared overpayments in 1955. [R. 13-14.] On
December 6, 1955, a portion of these overpayments was
credited against the unpaid assessment for 1945. [R. 15.]
This suit was initiated in the court below on April 23,

1957. [R. 8.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346(a)(2). A summary judgment dismissing the complaint was entered on May 28, 1957. [R. 17.] Within sixty days, and on June 12, 1957, a notice of appeal was filed by taxpayer. [R. 17.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the District Court correctly decided that under Section 3771(b)(1), Internal Revenue Code of 1939 no interest was allowable on the overpayments for 1943 which were credited to the unpaid assessment for 1945 since the date of the assessment for 1945 preceded the dates of the overpayments for 1943.

Statutes Involved.

The applicable statutes may be found in the Appendix, *infra*.

Statement.

The facts as found by the District Court are as follows [R. 13-15]:

On or before March 15, 1946, taxpayer filed his individual federal income tax return for the year 1945 with the Collector of Internal Revenue for the Sixth District of California and paid the taxes shown thereon to be due in the sum of \$4,300.69. [R. 13.]

On March 15, 1948, there was assessed against the taxpayer a deficiency in income tax for the year 1945 in the sum of \$11,803.51 plus interest in the sum of \$1,363.22 computed to February 18, 1948. On March 23, 1948, the taxpayer was served with a Form 17, notice

and demand to pay the assessment, but did not do so within ten days. [R. 13.]

On March 29, 1955, there was entered in this Court in favor of the taxpayer and against Harry C. Westover, a former Collector of Internal Revenue, in Docket No. 13521-Y, a judgment decreeing an overpayment of income taxes for the years 1943, 1944 and 1946 together with interest as provided by law. A certificate of probable cause was included in the judgment. [R. 13-14.]

With respect to the year 1943 the judgment set forth the following overpayments with the dates of payment as follows [R. 14]:

\$1,700.00—May 6, 1948
\$1,454.58—August 9, 1948
\$1,700.00—September 9, 1948
\$1,700.00—October 8, 1948
\$1,700.00—November 6, 1948
\$ 781.83—December 6, 1948
\$1,700.00—January 13, 1949
\$1,700.00—February 14, 1949
\$ 243.19—March 14, 1949

On March 30, 1955, taxpayer filed with the Commissioner of Internal Revenue a judgment claim for refund based on the judgment. [R. 14.]

Thereupon, the Commissioner issued a Notice of Adjustment, Form 1331-B, advising the taxpayer that a portion of the adjudged overpayment of taxes had been credited to the unpaid balance of the outstanding assessment for the year 1945. The remaining overpayments together with interest to November 8, 1955, a date preceding the date of the refund check by not more than thirty days were refunded to the taxpayer. [R. 14.]

On December 6, 1955, the District Director of Internal Revenue signed the schedule containing the overassessment whereby there was credited out of the overpayments for the year 1943 \$7,419.14 toward the balance of unpaid assessed tax for 1945, and \$4,161.21 toward interest accruing thereon from the date of the assessment, March 15, 1948, to December 6, 1955. [R. 15.]

The date of the assessment, March 15, 1948, of the 1945 tax liability preceded the dates of the payments made on the tax liability for the year 1943 as set forth above. No interest was allowed on the overpayments credited to the assessed tax. Interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment from the dates of payment to December 6, 1955. [R. 15.]

The District Court held that the District Director properly credited the adjudged overpayments for 1943 to the unpaid assessment for 1945 and that no interest was allowable on the overpayments credited since the date of the 1945 assessment preceded the dates of the 1943 overpayments. [R. 15-16.]

Summary of Argument.

Interest is allowable against the United States only when specifically provided for by law. Section 3771(a) applies to any case of interest upon an overpayment. Section 3771(b)(1) applies to any case of crediting an overpayment and allows interest upon the overpayment from the date of the overpayment to the date of the

additional assessment to which the overpayment is credited. In any case of an overpayment, a credit against the amounts due by taxpayer is proper before any refund is made. The overpayments here for 1943, therefore, were properly credited to the unpaid additional assessment for 1945. Consequently, interest was not allowable on the 1943 overpayments credited because the overpayment dates were subsequent to the 1945 assessment date. Section 2411(a), 28 U. S. C., provides only for interest on an overpayment which is refunded. It does not purport to provide for interest where a credit is made; the section is applicable only where the overpayment is refunded.

Plainly Congress has not attempted to equalize interest in the event of indebtedness on the part of both the Government and the taxpayer. The effect of the provisions may be disadvantageous to the Government as well as to the taxpayer. There is no basis, therefore, for a claim of injustice.

Taxpayer's claim that no summary judgment could be entered here is without merit because the facts material to this suit are shown by the documents in the record and there is no controversy with respect to those facts.

Accordingly, the District Court correctly held that no interest was allowable on the 1943 overpayment credited to the 1945 assessment because the 1945 assessment date preceded the 1943 overpayment dates. In addition, the motion for summary judgment was properly granted.

ARGUMENT.

The District Court Correctly Decided That Under Section 3771(b)(1), Internal Revenue Code of 1939, No Interest Was Allowable on the 1943 Overpayments Credited to the 1945 Assessment Because the 1945 Assessment Date Preceded the 1943 Overpayment Dates.

Interest is allowable against the United States only when specifically provided for by law. *Angarica v. Bayard*, 127 U. S. 251, 260; *United States v. Goltra*, 312 U. S. 203, 207. The Internal Revenue Code provides for interest "upon *any* overpayment" (italics added), but a clear distinction is made between the instance of crediting an overpayment, and the instance of refunding an overpayment. A different rule for computing interest applies in each instance. Section 3771, Internal Revenue Code of 1939 (Appendix, *infra*). In providing for interest upon *any overpayment*, when an overpayment is credited against an additional assessment, as here, interest is allowed from the date of the overpayment to the date of the additional assessment. Section 3771(b)(1). Whenever there is an overpayment, it must first be credited against taxes due from taxpayer before any refund is made. Section 6402(a), Internal Revenue Code of 1954¹ (Appendix, *infra*). There is no question that

¹Section 6402(a) is substantially the same as Section 322(a)(1), Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 322) which provides:

(a) *Authorization.*

(1) *Overpayment*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

the requirement of crediting is mandatory (*York Safe & Lock Co. v. United States*, 40 F. 2d 148 (C. Cls.), certiorari denied, 282 U. S. 839; *Standard Oil Co. v. United States*, 5 F. Supp. 976 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Cole v. Helvering*, 73 F. 2d 852 (C. A. D. C.); *Blair v. United States ex rel. Union Pac. R. Co.*, 6 F. 2d 484 (C. A. D. C.)), although taxpayer apparently argues to the contrary. (See Br. 13-15.) And, the requirement of crediting is not vitiated, as taxpayer argues (Br. 9-11), because the overpayment is adjudged rather than determined by the Commissioner. *United States ex rel. Cole v. Helvering*, *supra*; *Blair v. United States ex rel. Union Pac. R. Co.*, *supra*. See, also, *Tull & Gibbs, Inc. v. United States*, 48 F. 2d 148, 150 (C. A. 9th); *Noyes v. United States*, 55 F. 2d 870, 872 (C. A. 9th). In *Blair v. United States ex rel. Union Pac. R. Co.*, *supra*, p. 486, the court stated:

"The section accordingly should receive a liberal construction, in order to give effect to the manifest legislative intent, and in this view there is no reason to deny it application where such an overpayment has been reduced to judgment. In this instance that action was made necessary by a mistaken ruling of the department, not by any default of the taxpayer, and the latter should not be penalized because of it. It is true that section 252 does not specify judgments *eo nomine* as entitled to be credited upon later assessments, but extends that right to amounts which,

No change in the law was intended by Section 6402(a) except to permit expressly the crediting of interest on an overpayment against any outstanding liability for any tax. H. Rep. No. 1337, 83d Cong., 2d Sess., p. A412 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4559); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 581 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5230). In fact, Section 6402(a), Internal Revenue Code of 1954 consolidates Sections 322(a)(1) and 3770(a)(4), Internal Revenue Code of 1939.

upon an examination of any return, appear to be in excess of that properly due. The present claim is of such a character, as is evidenced by the judgment of the court. The judgment did not create the claim, nor change its character; it was, and it remained, a claim for an amount of income tax 'paid in excess of that properly due.' The character of the claim and not its form, should control."

* * * * *

"Moreover, the contention of the respondent tends to deprive section 252 of any force or effect whatsoever; for section 3220 authorizes the Commissioner of Internal Revenue to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, as well as to repay to any collector such sums of money as may be recovered against him in any court, for any internal revenue taxes collected by him. These provisions apply, not only to judgments, but to all other claims for overpayments of income taxes, and if it be held that they shall control over those in section 252 nothing will remain for the latter section to operate upon."

* * * * *

"The duty imposed upon the respondent, according to the conceded facts in the case, was mandatory, not discretionary; the language of the statute is 'the amount of the excess shall be credited'; the courts therefore have jurisdiction to determine the correct construction of the statute and to compel the respondent to proceed accordingly."

The crediting here, therefore, complied with the mandate of Congress. Consequently, as Section 3771(b)(1) makes crystal clear, interest is allowed only from the date

of the overpayment to the date of the assessment to which the overpayment is credited. As applied to this case, the result is that no interest is allowable on the overpayments credited to the unpaid assessment,² as the District Court held, because the dates of the overpayments, from May-November, 1948 [R. 8], were subsequent to the 1945 assessment date of March 15, 1948. [R. 13.]

As taxpayer admits, interest is payable on overpayments and not on judgments. (Br. 7.) Section 2411(a), 28 U. S. C. (Appendix, *infra*), provides only for interest on overpayments refunded. That section provides for interest at the rate of six percent per annum from the date of the payment to a date not exceeding 30 days from the date of the refund. Substantially the same provision is found in Section 3771(b)(2), Internal Revenue Code of 1939. Obviously Section 3771(b)(2) is not applicable where Section 3771(b)(1) applies because a credit and not a refund is made. Section 2411(a), 28 U. S. C., does not purport to provide for interest where a credit is made. That section is applicable only where the overpayment is refunded.³

²In this connection, it may be pointed out that interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment. Interest was allowed from the dates of payment to December 6, 1955, which was the date of the credit.

³Section 3773, Internal Revenue Code of 1939 (Appendix, *infra*) contains the reference to the Judicial Code and was re-enacted as Section 6612, Internal Revenue Code of 1954. As the Committee Report to the Internal Revenue Code of 1954 states, the section "contains references to general provisions of law relating to interest on judgments for overpayments and to restrictions on interest." S. Rep. No. 1622, *supra*, p. 590 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5239). Section 6612 provides as follows:

Sec. 6612. Cross References.

(a) *Interest on Judgments for Overpayments.*—

For interest on judgments for overpayments, see 28 U. S. C. 2411(a).

Moreover, the judgment stated “together with interest on said sum as provided by law * * *.” [R. 4.] The judgment requires interest only as the law provides which here, we submit, is as allowed under Section 3771(b)(1), as demonstrated above, and not, as taxpayer argues, on all of the overpayments from the date of payment to December 6, 1955, as if all of the amounts were refunded.⁴ (Br. 15.)

Taxpayer argues that it was not the intent of Congress to charge a taxpayer with interest on an assessment but to deny him any interest for the same period on an overpayment credited to the assessment. (Br. 11-12.) This equitable argument has been rejected in many cases whether made by the Government or a taxpayer. *Virginia Electric & Power Co. v. United States*, 126 F. Supp. 178 (C. Cls.); *Dewey Portland Cement Co. v. United States*, 128 F. Supp. 385 (C. Cls.); *Ash Grove Lime & Portland Cement*

(b) *Adjustments.*—

For provisions prohibiting interest on certain adjustments in tax, see section 6413(a).

(c) *Other Restrictions on Interest.*—

For other restrictions on interest, see section 2011(c) (relating to refunds due to credit for state taxes), 2014(e) (relating to refunds attributable to foreign tax credits), 6412 (relating to floor stock refunds), 6413(d) (relating to taxes under the Federal Unemployment Tax Act), 6416 (relating to certain taxes on sales and services), and 6419 (relating to the excise tax on wagering).

(26 U. S. C. 1952 ed., Supp. II, Sec. 6612.)

⁴Even if the judgment called for interest not provided for by law, it would not be sufficient authority for the Commissioner to pay. See *Angarica v. Bayard*, *supra*; *United States v. Goltra*, *supra*; and Sol. Op. 143, I-2 Cum. Bull. 261 (1922).

Co. v. United States, 128 F. Supp. 387 (C. Cls.); *Abney Mills v. United States*, 130 F. Supp. 353 (C. Cls.); *Babcock & Wilcox Co. v. Pedrick*, 212 F. 2d 645 (C. A. 2d), cer. den., 348 U. S. 936; *Tull & Gibbs, Inc. v. United States*, *supra*; *Noyes v. United States*, *supra*; *Pan American World Airways, Inc. v. United States*, 119 F. Supp. 144 (S. D. N. Y.); *Max Factor & Co. v. United States* (S. D. Calif), decided January 25, 1951 (43 A. F. T. R. 740) (51-1 U. S. T. C. par. 9195). Cf. *United States v. Koppers Co.*, 348 U. S. 254; *Manning v. Seeley Tube & Box Co.*, 338 U. S. 561. Interest is imposed on a deficiency from the date the tax was due to the date the deficiency is assessed. Section 292(a), Internal Revenue Code of 1939 (Appendix, *infra*). Interest on an additional assessment is imposed on the unpaid amount from the date of notice and demand until paid. Section 294(b), Internal Revenue Code of 1939 (Appendix, *infra*). Interest on an overpayment is allowed, in the case of a credit, from the date of the overpayment to the date of the additional assessment to which the credit is taken. Section 3771(b)(1). The effect of the provisions may be disadvantageous to taxpayer, as here, just as the effect may be disadvantageous to the Government. For example, it has been held repeatedly that an overassessment continues to bear interest even though it is offset by an unassessed deficiency upon which interest has ceased to accrue from the filing of a waiver. *Virginia Electric & Power Co. v. United States*, *supra*; see Rev. Rul. 55-485, 1955-2 Cum. Bull. 499, as modified by Rev. Rul. 56-573, 1956-2 Cum.

Bull. 955. The principle that interest upon offsetting overpayments and deficiencies must be separately computed without regard to mutual cancellation of claims is also held. *Babcock & Wilcox Co. v. Pedrick, supra*.

Taxpayer also complains that no summary judgment could be entered here because a material issue of fact remains. This fact, taxpayer says, is that the prior judgment ordered a refund. (Br. 16.) All of the allegations in taxpayer's complaint were admitted in the Answer. [R. 9.] Taxpayer did not object to the affidavit submitted with the motion for summary judgment. These documents show the facts material to this suit and there is no controversy with respect to these facts. Judge Yankwich who decided the instant case also entered the judgment in question. No reason appears, therefore, to prevent a summary judgment. In any event, even if the prior judgment referred to a refund, it could not affect the proper allowance of interest where a credit has been made. Section 6402(a), Internal Revenue Code of 1954; *Angarica v. Bayard, supra*; see footnote 4, *supra*. The fact that the judgment referred to a refund, therefore, is inconsequential.

Conclusion.

The District Court correctly held that no interest was allowable on the 1943 overpayments credited to the 1945 assessment because the 1945 assessment date preceded the 1943 overpayment dates. The motion for summary judgment was properly granted and the judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

Internal Revenue Code of 1939:

SEC. 292 [As amended by Sec. 2, Act of December 17, 1943, c. 346, 57 Stat. 601]. INTEREST ON DEFICIENCIES.

(a) *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under sec-

tion 272(i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

* * * * *

(26 U. S. C. 1952 ed., Sec. 294.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate*.—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period*.—Such interest shall be allowed and paid as follows:

(1) *Credits*.—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds*.—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

(c) *Additional Assessment Defined*.—As used in this section the term 'additional assessment' means a further assessment for a tax of the same character

previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924, 43 Stat. 253, or by any subsequent Revenue Act.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3771.)

SEC. 3773. INTEREST ON JUDGMENTS.

For interest on judgments, section 177, of the Judicial Code as amended by act of May 29, 1928, ch. 852, §615, 45 Stat. 877 (U. S. C., Title 28, §284).

(26 U. S. C. 1952 ed., Sec. 3773.)

Internal Revenue Code of 1954:

SEC. 6402. AUTHORITY TO MAKE CREDITS OR REFUNDS.

(a) *General Rule.*—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall refund any balance to such person.

* * * * *

(26 U. S. C. 1952 ed., Supp. II, Sec. 6402.)

28 U. S. C.:

SEC. 2411 [As amended by Sec. 120, Act of May 24, 1949, c. 139, 63 Stat. 89]. INTEREST.

(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of

any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.

* * * * *







